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THE TRANSFORMATION OF THE CHINESE JUDICIARY

FROM THE TRADITIONAL TO THE MODERN

A STUDY IN JUDICIAL REFORM IN REVOLUTIONARY CONDITIONS

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Bachelor of Philosophy
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Abstract

This thesis researches and analyses on the judicial system and its position in the modern society with the methodologies of modernization theory, ideal type, functionalism and legal philosophy. Furthermore, it discusses and analyses the basic differences of value, mode and operation of the traditional and modern judicial systems. Consequently this research project advances and explains the view that China's current judicial reform activity should be regarded as a continuation of the historical process of transformation of a traditional judiciary into a modern one. It identifies and discusses the practical incentives as well as impediments to judicial modernization in China. The research focuses on the essential structural requirements of a modern judicial system that is appropriate to China's emerging free market economy, so that the judicial system could suit with the change and development of the society. Meanwhile it summarizes the experiences of the judicial reform in recent years in China and offers practical suggestions for the revision and improvement of the judicature, as well as to develop an appropriate model for judicial reform in China with the benefit of the historical experiences of other nations that have achieved stable and prosperous societies through democracy and liberal constitutionalism.

Declaration by author

This thesis is composed of my original work, and contains no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

I have clearly stated the contribution of others to my thesis as a whole, including statistical assistance, survey design, data analysis, significant technical procedures, professional editorial advice, and any other original research work used or reported in my thesis. The content of my thesis is the result of work I have carried out since the commencement of my research higher degree candidature and does not include a substantial part of work that has been submitted to qualify for the award of any other degree or diploma in any university or other tertiary institution. I have clearly stated which parts of my thesis, if any, have been submitted to qualify for another award.

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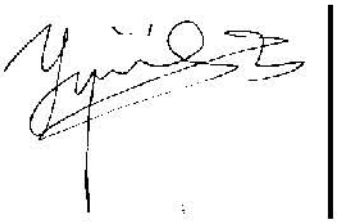

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3. *Company Law and Its Reform in China (Zhonguo de Gongsifa he Ta de Gaige)*, Issues 32-39th, 2002, Queensland Asian Business Weekly, Australia.
4. *China's Legal System of Related Foreign Matters (Trade Law, Land Law, Company Law, Investment Law, Taxes Law, Contract Law) and Their Reform (Zhongguo Shewai Falv Zhidu he Tamen de Gaige)*, a series of article, Issues 306-359th, World News Weekly 2003, Australia.
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No contributions by others.

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In June of 2002, I received an International Postgraduate Research Scholarship and commenced my research on this topic. In the first two and half years, I spent my most of studying time collecting and reading research data and formulating research questions. I also made efforts to improve my English academic writing skills. Even then when I began the writing process, I encountered difficulties in the writing of this thesis which went beyond what I anticipated. Consequently, I had to spend a long time rethinking and re-understanding some important issues and this resulted in some fundamental changes to my ideas. So the process of writing this thesis has been slow with frequent revising of the drafts. However, it has been an enjoyable challenge for me to complete this thesis.

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Keywords

judiciary, judicial system, tradition, modernisation, judicial reform, transformation, China, the rule of law, democracy

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Table of Contents

List of Tables and Figures

List of Abbreviation used in the Thesis

PRC: the People's Republic of China

CPPCC: the Chinese People's Political Consultative Conference

CCP: the Chinese Communist Party

CNP: the Chinese National Party (KMT)

ROC: the Republic of China

NPC: the National People's Congress

SC: the State Council

PLA: People's Liberation Army

SPC: the Supreme People's Court

HPC: the High People's Court

IMPC: the Intermediate People's Court

GPC: the Grassroots People's Court

CHAPTER 1: INTRODUCTION

A. The Aim and Significance of the Research

In the 21st century, we are confronted with an increasingly multi-polar world that faces both growing economic globalization and the emergence of more civil societies.[1] Both economic globalization and the growing awareness of civil society are catalysts for the rule of law and a clear-cut legal system. In all countries, the legal system has a political dimension, which, in the case of democracies, provides framework conditions for a constitutional state as well as the rule of law. There is, however, a multitude of legal systems. Legal systems differ, because they are based on differing ideas on the economy and social values and implement different legal traditions. Despite all the differences, certain legal questions have to be solved by all countries alike. These questions have similar characteristics and thus transcend national boundaries. Cultures, traditions and different forms of government lead to different evaluations and necessitate distinct solutions. Nevertheless, questions, such as "what is law?" and "why do we need the rule of law?" and "what is the role of the judiciary with respect to the rule of law" are common issues raised in all countries. There is also an international dimension to law from which a common understanding concerning confidence in the rule of law, human rights, judicial independence and competence and the style of lawmaking are beginning to emerge.

In early 2003, the Chinese SARS crisis made it painfully clear that better governance and greater government accountability are necessary to sustain economic success and the welfare of the people.[2] Overtime there has been increasing pressure on the government to provide stability, transparency and accountability.

1. Theoretical significance of the project

Law, legal reform and legal development comprise a profound socio-political process. Since the beginning of the 1990's China has begun to modify its laws and has strengthened law-related

[1] Liou Guangxi & Zhang Hanlin, *WTO and Chinese Economy* (2000) 49-51.

[2] SARS=*Severe Acute Respiratory Syndrome*, it was discovered firstly in Feb 2003 in Guangdang China. Because Chinese government concealed the information about SARS in its early phase, causing SARS virus spread quickly to 27 countries and areas in the world via Hongkong and 26 provinces in the mainland of China. Until 20 April 2003, Chinese government acknowledged SARS was serious and took emergency measures to protect against SARS. It is generally regarded that SARS causes damage to world economy and Chinese economy.

institutions.[3] It has acknowledged the need for the rule of law and judicial reform in 1997. These endeavors have been mainly driven by the need to adjust China's economy and sustain economic progress.

The People's Republic of China started to reconstruct its legal system in the 1980's. Since then, China has transformed itself dramatically and during recent years the world has witnessed remarkable reforms taking root in the field of Chinese law.[4] With China's transformation from a planned economy into a market economy and its admission into WTO, there is increasing interest in the Chinese legal system. Observers are not only keen to ascertain the law as enacted but also the extent to which the enacted laws are implemented - in other words, whether the law in operation reflects the law in the books.

There is growing public recognition that the courts are pivotal to the process of legal reform as they are the fundamental mechanism by which people's legal rights are safeguarded and that they are the final institutions to which people have resort to settle their disputes and secure fairness and social justice. Chinese people, however, have been in an ambivalent position as far as the courts are concerned, because of the deficiencies in the laws and guiding principles with regard to the courts structures and the corruption phenomenon observed in the judicial activities. People respect the impartiality of the judiciary and its positive functions in certain aspects, but have strong reservations owing to the non-independence of the judiciary in practice.

As a senior judge, I have been judging various kinds of cases for sixteen years, and as professor, I have been teaching comparative legal systems and judicial systems for several years. I have developed an understanding of the present state of the Chinese legal system and the judicial system. I have always maintained a strong focus on judicial reform in China. It is hoped a systematic study of the experiences of Australia and the West will be a useful point of reference in the reform of China's legal system and courts. Hence my selection of the topic: The transformation of the Chinese Judiciary from the traditional to the modern: A study in judicial reform in revolutionary conditions.

The typological method that characterizes much of the current research in China on judicial modernization is insufficient. Chinese scholars rarely launch into macro investigations in studying the judiciary and judicial modernization. Their research tends to be narrowly focused on

[3] In 1992 Chinese government formally adopted the policy of building a socialist market economy system. For this purpose, it had set the task of establishing a socialist market economy legal system and made a legislative plan according with this task.
[4] In 1997, it was proposed that governs the country according to law and makes a socialist country ruled by law as well as accelerates the judicial reform in CPC 15th congress. In 1999, a new paragraph that is "the People's Republic of China governs the country according to law and makes a socialist country ruled by law" was added to Chinese constitution.

technicalities displays little inquiry at the overall institutional level. While Chinese scholarship remains mired in technicalities, there are a small number of the western scholars researching the subject. One of the reasons for this is the difficulty of understanding the detail and characteristics of Chinese social construction and institutions that formed under the 'closed' conditions of China since 1949. This is also a reason for the general scarcity of information about China.[5] In contrast, this study aims to combine my detailed knowledge of the Chinese political, social and legal system gained through extensive research and experience with analysis undertaken with the theoretical tools provided by philosophy and institutional economics.

I will discuss the critical role of the judiciary within the political system. Undoubtedly the judiciary plays a distinctive central role in every kind of modern society. It has been said that in modern society, unsolved political issues ultimately become judicial issues. The central role of the judiciary in liberal constitutional democracies is well understood. However, the importance of the judiciary to the emerging political order in modern China is not so well understood within China at a time of revolutionary change from a planned economy to a market economy. My thesis aims to place in focus the imperative of judicial reform in the modernization process of China. Since the ideas of constitutionalism and the role of the judiciary in constitutional government is less well understood in China, my thesis will engage in the discussion of these ideas although they are neither novel nor particularly controversial in liberal democracies.

Judicial reform is a breakthrough point in Chinese political reform. China has made very impressive progress in its economic reforms.[6] However, its efforts to set up a free market economy are being hindered by its unreformed political system. Because the Chinese Communist Party (CCP) and Chinese government have been preoccupied with maintaining social stability and preventing challenges to their authority, they have made little effort to promote political reform and effect a transition from the rule of man to the rule of law. The great challenge now is to extend China's reform process to the political system.

In this thesis I adopt a theoretical developmental model based largely on Chinese Marxism but sophisticated by the institutional thinking of liberal scholarship. In this model, economic development causes a metamorphosis of economic relations and property relations.[7] The new economic and property relations inevitably produce changes in social politics. They generate social

[5] K.Zweigert & H.Kotz, *An Introduction to Comparative Law* (1998) 294.
[6] For instance, China has adopted a free market economic system; has been importing investments from overseas and developing the private enterprises; entered WTO.
[7] The Translation and Edit Bureau of the Contral Comittee of the CCP: Marx & Engels, *Marx and Engels Selection* (1980) vol 2, 82

pressures for legal and judicial reforms that prompt the government to modernize the legal system to reflect the new economic and property relations. The reform of the judiciary is an essential part of this process as the integrity of the legal system ultimately depends on the judiciary. The rule of law takes root in society when the people begin to trust the judiciary. The rule of law, once established, protects individual rights and civil society provides a stable political environment for further reform and modernization.

2. Practical significance of the project

When we consider that one in five people in the world lives in China, its influence on the world as a whole and its potential to impact on the development destiny of the entire mankind cannot be ignored. This reason alone expounds the significance of researching Chinese issues. Furthermore, China is one of the biggest markets in the world. Foreign governments, investors and traders alike worry about the security of their interests and benefits in dealings with the government and the business sector of China. Much of this concern arises with respect to the capacity of the Chinese judiciary to protect rights. They need to know in what respects China's judiciary differs from the West and whether the laws that regulate people's conduct and are applied and enforced by judicial authorities.4 This research will endeavour to provide reliable answers to such questions and offer foreigners insights into the reality of judicial operations in China as well as China's efforts to modernize the judiciary.

This study advances and explains the view that China's current judicial reform activity may be regarded as a continuation of the historical process of transformation of a traditional judiciary into a modern one. The process began in 1906 and continued until it was interrupted by the revolution of 1949. It was resumed in 1992. The study will identify and discuss the practical incentives as well as impediments to judicial modernization in China. In that process, the thesis will focus on the essential structural requirements of a modern judicial system that is appropriate to China's emerging free market economy. These requirements are connected with the institutional conditions necessary to sustain the market economy including the conditions of the rule of law, democracy, transparency, accountability, efficiency, fairness and due administration of justice.

Finally, I will offer my practical suggestions for the revision and improvement of the judicature. These suggestions will flow from the close examination of China's current legal system, her political institutions and internal checks and balances and their comparison with the successful counterparts in western democracies. The object is to develop an appropriate model for judicial

reform in China with the benefit of the historical experiences of other nations that have achieved stable and prosperous societies through democracy and liberal constitutionalism.

B. Basic Method for the Research

1. The analytical framework of this thesis: use of modernisation theory

The principal methodological approach of this thesis is based on modernization theory. Modernization theories seek to describe and explain the process of change and the changes that have occurred since the Industrial Revolution in the 18th century in all aspects of human life. They seek to explain the course of the development of the industrialized nations from the middle of 18th century to the middle of 20th century, and the process of modernization in developing countries more recently. Modernization causes the transition from traditional politics, economy, society, culture and civilization to modern politics, economy, society, culture and civilization.[8]

There are two reasons why modernization theory is appropriate for the study of Chinese judicial development. Firstly, the judiciary and the legal system are integral parts of the organic society. If modernization is treated as a process of change in all aspects of the society and society as a whole, it follows that judicial modernization is necessarily a part of this process. Therefore the process of judicial modernization, presumptively, can be analyzed according to the same principles of modernization theory. Secondly, although the process of legal modernization in China has been discussed in-depth by Chinese and overseas scholars, the topic of judicial modernization has hardly been touched. Hence the study of the Chinese judicial reform process through the application of modernization theory remains an important unfinished task. I will argue that modernization theory is the most suitable theoretical model for this study.[9]

Of course, it must be made clear that modernization theory is applied in this thesis as a theoretical tool in conjunction with other theoretical insights. Modernization theory has been applied mainly in macroscopic analysis. Hence in using this theory in relation to the conceptual category of the judiciary, we still need other theoretical inputs and refinements. It is also conceded that modernization theory has numerous forms and is complex. However, it provides the basic theoretical tools for discussing judicial modernization. The dichotomy of traditional and modern society does not correspond exactly to the dichotomy of traditional nation and modern nation state.

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[8] C. E. Black, *The Dynamics of Modernization* (1966).

[9] Walforg Charpford, *Modernization and Social Change* (1998) 67.

In each case the ideas of the traditional and of the modern have different connotations. Despite these differences, the overall dichotomy between traditional society/nation and modern society/nation is rich in empirical content and has much explanatory value. Overall, the traditional society/nation is very distinct from the modern society/nation. Finally, application of modernization theory is a valid methodological tool because transition from the traditional to the modern appears to be a universal, dynamical and irreversible trend. For these reasons, I propose to adopt modernisation theory as my principle theoretical model to examine the process of transition of the Chinese judiciary from the traditional to the modern paradigm. It is an observable historical trend that the transformation of traditional societies into modern market oriented societies inevitably involves the transformation of their judicial systems from the traditional to the modern paradigm. This thesis will consider whether the Chinese judiciary also has to go along the same road.

2. Methodology

Given that this thesis is about an aspect of the historical transformation of Chinese society and of the Chinese state, I propose that the appropriate methodology may be founded on the 'ideal type' approach identified by Max Weber and the functionalist tradition in sociology.

a. Ideal type method

The conceptualization of history in terms of ideal types is one of the methods adopted by Max Weber.[10] This approach involves the construction of a super- empirical and purely notional ideal-typical category that can serve as a frame of reference to explain empirical and realistic objects and relations. That is to say, I will use the most basic and uncontroverted characteristics about the concept of a modern judiciary to construct the reasonable ideal type that will serve as a model to compare the judiciary at different levels. Of course, an ideal type judiciary need not exist in reality. All that the ideal type postulates is that the specified characteristics will be found to one extent or another in actual systems that are categorized by the ideal type. The judiciary of an ideal type is very difficult to find. Indeed, there are no perfect patterns in society. It is likely that at a given point in history the society as a whole and the judiciary as an aspect of it will display characteristics of more than one ideal type. However, it may be possible to discern having regard to the complex realities of social systems that the system is nearer to one ideal type than to the other.

It should be noted that the construction of an 'ideal type' is not a value-neutral exercise. My own

[10] Max Weber, *The Protestant Ethic and the Spirit of Capitalist* (1976).

separation of judicial systems into the traditional; and the modern ideal types is not only based on empirical observations and generalizations but is also influenced by my own values and attitudes. Chinese society including its judiciary is going through revolutionary change toward the modernization. Therefore it is unavoidable that I like the rest of society am involved in this process and hence cannot wholly eliminate my own values from the analysis of this transition.

b. Functionalism

Conceptualizing systems into ideal types must be guided by rational criteria. Functionalism, which is a principal methodological tool of sociology, provides useful guidance in this regard. Conceptualizing a system in functional terms involves three principal assumptions. It has three main characteristics. (1) Differentiation – a system may be conceived as made up of interacting subsystems. Thus, the judicial system is seen as a subsystem that is a component part of the social system that also includes the political system and the moral system. (2) Interdependency - these subsystems are mutually connected to each other and are functionally interdependent in the sense that each subsystem contributes positively to the operation of the whole system. (3) Wholeness – the normal operation of each component subsystem requires the normal operation of other subsystems although occasionally one subsystem may offset the failure of another subsystem.

Functionalist method has been extensively applied in comparative law. The basic methodological principle of all comparative law is that of functionality. Incomparable systems cannot usefully be compared, and in law the only things that are comparable are those that fulfill the same functions.[11]

This research concentrates on the traditional and modern judiciaries. When we focus on the operational model of the modern judicial type, it is beyond doubt that the modern judiciary is the outgrowth of western liberal democracies. There is no counterpart in Chinese history. For this reason, this research will establish a premise that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.[12] So the point of departure for this study is the perspective of pure function. It means that the study will look behind legal language and the formal legal system to focus on the real problems that the legal system responds to in the modernization process.

In addition to above two methods, this research will also adopt as appropriate, the historical method, the comparative method and the substantial investigation method. The aim of the comparative

[11] K.Zweigert & H.Kotz, *An Introduction to Comparative Law* (1998) 34.
[12] Ibid, 34

approach is to evaluate the outcome of Chinese judicial reform and to provide a frame of reference for formulating effective judiciary reform in China.

C. Outline the Structure and Basic Contents of the Thesis

This thesis will comprise 9 chapters including the introduction and conclusions.

Chapter 1: Introduction

The introduction will define the aims and objects of the research and explain its theoretical and practical significance. It will survey the literature on the subject and explain the contribution that the thesis makes to the advancement of knowledge in relation to the subject. The chapter will also explain the methodology of research and outline the structure and contents of the thesis.

Chapter 2: The concept of modernisation

This chapter discusses the idea of modernisation as the historical replacement of a traditional institutional environment and mode of living by a modern institutional environment and mode of living. This statement, of course requires an explanation with respect to the idea of 'modernity'. Is modernity what comes later? Not necessarily, as the rise and fall of civilisations demonstrate. Modernisation in this discussion refers to transformation of a traditional legal system to one that is characterised by the rule of law, transparency, governmental accountability and other safeguards of rights and liberties of the citizen associated with liberal democratic societies. Modernization does not happen overnight or by single acts. Rather, it is a continuing process much like a huge river in continuous flow.

The chapter distinguishes between culture and civilisation. Modernisation in the sense used in this thesis is a process of civilisation. The legal system is part of a society's culture hence legal development is an important part of social development. When the legal system is transformed, the culture is transformed. When the legal system is transformed to achieve the prevalence of the rule of law, the resulting cultural transformation is one of civilisation. The chapter analyses the causal relationships between modernization, the achievement of the rule of law and judicial reform. It explains the central role of judicial reform to the process of social modernization.

Chapter 3: Comparison of traditional and modern judicial models

This chapter uses the theory of modernization as a framework for comparing and analysing the traditional and modern judicial systems. The chapter will explain how a modern judicial model differs from traditional judicial model, focusing on four distinguishing elements. The first is the element of structure, which includes the extent of separation between judicial and other powers, the degree of judicial independence and the level of due process in proceedings before the courts. The second is the element of the substantive criteria of adjudication. Do courts judge according to general, impersonal and published laws or do they have wide discretionary powers that enable them to make decisions based on policy? The third element relates to the competence and professionalism of judges. Are judges trained and experienced lawyers with specialised judicial competencies or are they laymen or political agents? The fourth element concerns the role of the judge. How does the judge serve the cause of social development? Is it by upholding the rule of law that enables development to occur or by the direct intervention in the political regulation of society? Generally speaking, the first two elements are concerned with permanent values of the judicial system whereas the third and fourth elements represent the dynamic aspects of the system, the flesh and blood of judiciary.

Chapter 4: The determinants of the pathway of judicial modernisation

This chapter discusses the forces that drive judicial modernisation and trace the evolutionary pathway of judicial transformation from the traditional to the modern. Once the traditional and modern models of the judiciary are understood, we need to investigate the relationship between the two and inquire as to how over time the traditional leads to the modern. Marxist historicism posits that the nature of economic relations at a given time in history determines the superstructure or the institutional framework of society. Thus, it is a general trend in the transformation of a traditional society into a modern society that the economic system that underpins the social structure evolves from early tribal arrangements to agrarian economic relations and thence to complex industrial and commercial relations within markets. This metamorphosis drives a parallel evolution of legal structure that gives form to the emergent economic relations. The great characteristic of this transformation is the transition of the state from the rule of man to the rule of law. The transformation of the traditional judiciary into a modern judiciary is part of this process of social evolution that transforms tribal civilisations to commercial civilisation. Judicial modernisation is a key factor in the conversion of political society from the rule of man to the rule of law. It will be explained that on this view, judicial transformation from the traditional model into the modern model is related to the emergence of the free economy, democratic politics and the rule of law. According to this interpretation, judicial reform is a necessary requirement for modernizing the

economy, politics and social life.

Chapter 5: The traditional Chinese judiciary

This chapter explains the main characteristics of the traditional judiciary in Chinese society. It was characterized by unified powers, lack of independence from the executive branch of the state, severely restricted jurisdiction, uncertainty and unimportance of procedure (which made it difficult to determine whether proceedings were lawful or unlawful, or normal or abnormal) and the absence of a supporting and restraining independent legal profession. In the period 1906 to 1949, there were efforts to learn from the West and effect judicial modernization. The chapter will discuss these efforts and compare their constructivist nature as compared to the evolutionary development of judicial systems in western liberal democracies.

Chapter 6: The Chinese judiciary from the Revolution of 1949 to the date

This chapter discusses the current Chinese judiciary from the time of its establishment by the CCP in 1949 to the date. Analysis and interpretation of the institutional background from which the current Chinese judicial model arises is fundamental to its understanding. The chapter explains how the CCP broke off the process of Chinese judicial modernization in 1949, and how the new Chinese judicial structure was formed under closed conditions. The current Chinese judiciary was formed under the institutional background of the political-economic system created by the CCP. This judicial structure is quite different from the Western model and also differs from judicial structure of old China before 1949. The CCP formally adopted the aim of setting up a free market economy in 1992 and in furtherance of this aim, tried to recover the process of judicial modernization. This chapter also discusses how Chinese society has been rapidly transformed since this change of direction and why the present Chinese judiciary finds itself out of step with these developments. The result is that the current Chinese judiciary displays both traditional and modern features. Specifically, a deconstruction of what constitutes the current Chinese judicial model will be undertaken taking into account the influences of traditional China and the effect of the CCP's revolutionary changes after 1949. Interpretation of the characteristics and actual operation of the current Chinese judiciary will be undertaken. The chapter will explain why a gap exists between the current Chinese judiciary and the modern judicial systems of liberal democracies.

Chapter 7: The intergrades: the current Chinese judiciary between the modes of traditional and the modern

This chapter discusses in the current Chinese society even though the advantages of modernisation are visible, the disadvantages obstructing the process also clearly exist. The chapter analyses there are the traditional elements; in particular the institutional arrangement which was formed under the circumstances of the self-isolation after 1949 has existed stubbornly and had a strong influence on Chinese society in the 21st century. Since the 1980s, the economic target model for China has been a market economy, which shows that China has been pursuing modernisation as a goal for society. This chapter will explain why 21st century Chinese society is very complicated, the traditional elements and the efforts to modernise have become entangled, resulting in the current Chinese judiciary having a dual nature: a traditional and a modern nature. Although the efforts of the Chinese courts to pursue modernisation is visible over past 25 years, the traditional elements seem to leach into the judiciary, and has held back the process of judicial modernisation.

Chapter 8: Prospects for future reform of the Chinese Judiciary

This chapter discusses the prospects of future reform in the Chinese judiciary. It will examine some important dynamics of the judicial modernisation process including Western influence, global market pressures, internal power struggles, motive power, the impact of western civilization and the resilience of local culture. The analysis of these factors reveals the complexity of the challenge of judicial modernisation. This chapter also takes a closer look at the changes in Chinese society after 1992 and the pressures for changes in the Chinese judiciary to reflect this change. The process of modernization in China has been characterized by change in the economy from the planned economy towards a free market, in politics from autocracy towards a moderate democracy, in national administration from the rule of man towards the rule of law, in social relations, from personal attachment towards contract, and in ideology and culture from uniformity towards diversification. This chapter discusses impediments to judicial modernization in current China, focusing on how the current political system, constitutional structures and ideologies block judicial modernization. The chapter will consider the available options and strategies for progressing the judicial modernisation process in China.

Chapter 9: Conclusions

The conclusion summarizes the findings of the research project. These findings will test the

hypotheses that:

- The transformation of agricultural societies into modern industrialised and market based societies is a universal historical process.
- This formal manifestation of this transformation first appears in changes in the legal system. While there are variations in this trend between civilisations and societies, as a general model it is observable that legal modernisation of which judicial reform is a central element is a basic step in the historical process.

- The process of social modernisation thus necessitates a revolutionary transformation of the Chinese judicial system from the traditional to the modern paradigm.

D. Research Questions

The major research questions are represented in the hypotheses outlined above. The resolution of these questions requires the thesis to address the following specific research questions.

1. What is "modernization", and what is the relationship between social modernization and judicial modernisation?
2. What are the characteristics of the modern judicial paradigm? While there are significant differences between the civil law and common law judicial systems, can they be encompassed within a general model of a judiciary within a liberal democracy?
3. What is the institutional setting from which the reform movement must proceed and what are the available pathways to judicial modernisation?
4. What were characteristics of the traditional Chinese judiciary model, and what efforts were made to modernize the judiciary in China before 1949?
5. How does the current Chinese judicial model differ from the modern judicial system? (To what extent does it represent both the traditional and the modern?)
6. Does the current judicial system in China require further modernisation given the rapid changes in the Chinese socio-economic condition?
7. If so what should be the specific goals of Chinese judicial modernization?
8. What are the impediments to Chinese judicial modernization?
9. What strategies are available to overcome these impediments what immediate measures need to be taken to advance the process of modernisation?

E. Review of Relevant Literature

Since this thesis is based primarily on modernisation theory, I have focused my literature survey on the writings in this field as they are relevant to China. Historical tradition in jurisprudence has a distinguished pedigree commencing with the work of Henry Maine and Von Savigny and others. In the 1950s, some social scientists in the field of sociology, economy and politics initiated the modernization research. By the 1960s, this research had resulted in many books including the major works *Modernization: the Dynamics of Growth* (M. Weiner, 1966,), *Political Modernization in Japan and Turkey* (R. E. Ward, 1964), *Modernization and the Structure of Societies* (M. J. Levy, 1966), *The Dynamics of Modernization, A Study in Comparative History* (C. E. Black, 1966), *The Political Order in Changing Societies* (S.P. Huntington, 1968), *Law in Modern Society: Towards a Criticism of Social Theory* (Robert Mangabeira Unger, 1976) and *Modernization and Law* (Chuangao Wuyi)

These modernization theories describe the processes of change since the Industrial Revolution in the 18th century in all aspects of human life. This work focused on the transformation of the developed countries in the period from the middle of the 18th century to the middle of the 20th century, and also on the later modernization of developing countries. These studies cover transformation in political, economic, societal and cultural dimensions. However, though they address political modernisation in with respect to democratisation, constitutionalism and bureaucratic reform, they have not specifically focused on judicial modernization. The judiciary and legal system are indivisible parts of the social organism. If modernization is treated as a process of comprehensive change in all aspects of the society, the judiciary is not exempt from this process. Hence the task remains to apply modernisation theory to judicial change and China provides an ideal case for doing so.

The concept of the legal modernization has already been accepted in Chinese scholarship. Key studies on Chinese legal modernization include *Research on Chinese Legal Modernization (Zhongguo Falv Xiandaihua Yanjiu)* (Gong Peixiang, 1996), *Rules Choosing and Value Restructuring (Zhidu Xuanze he Jiazhi Chongjian)* (Xie Hui, 1998), *Research on Judicial Reform(Sifa Gaige YAnjiu)* (Wang Liming, 2000), and *Governing Country by Law and Judicial Reform (Yifa Zhiguo he Sifa GAige)* (Xing Chunying and Li Lin, 1999).

Since 1999, the constitutional amendments explicitly avow, for the first time in the constitutional history of the People's Republic, to 'govern the state according to law' and 'establish the socialist

state of rule of law';[13] and the Chinese Supreme People's Court published a blueprint of legal reform: 'The Program of a Five-Year Reform of the People's Court', the Chinese scholarship did many research on Chinese judicial reform, for example, *the Road is toward the City – Chinese Rule of Law in Transaction (Dao Lu Tong Xiang Cheng Shi – Zhuan Xing Zhong De Zhongguo Fa Zhi)* (Zhu Suli, 2004), *the method of delivering Justice (Yun Son Zheng Yi De Fang Shi)* (He Wei Fang, 1999) and *Chinese Courts History and Transition (Zhongguo Fayuan Lishi yu Zhanxing)*(Xin Chunying, 2004). The western scholars also have done many researches on Chinese judicial reform, such as, *Bird in a Cage: Legal Reform in China after Mao* (Stanley Lubman, 1999), Globalization, *Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China* (Randall Peerenboom, 2001).

Although these researches do discuss on Chinese judicial reform, and also touch Chinese judicial changing from the traditional to the modern in the certain level, they have not undertaken in-depth research on the judicial aspects of legal modernization. There has also hardly been any work on judicial reform in revolutionary conditions. Hence the need for the specific application of modernization theories to the problem of the transformation of the Chinese judiciary from the traditional to the modern.

[13] The overwhelming majority of the NPC supported the amendment. For a review of the amendment process, see Qiao Xiaoyang, *About the Background, Process, Principles, Content, and Significance of the Recent Amendment*, Chinese Legal Studies,1999, Issue 2.

CHAPTER 2: THE CONCEPT OF MODERNISATION

Judicial modernisation is a theoretical and practical topic. This chapter's primary objective is to construct a way of approaching this topic – a necessary first step in producing a theory of judicial modernisation – and to also develop an analytical framework that will provide a basic tool for analysis and further study of this topic.

I. Understanding modernisation

1. The concept of modernisation

Modernisation is a universal and complex phenomenon that evolved in the 1950s. One of the theoretical targets of modernisation theory is to investigate the common characteristics of those societies that have transformed from the traditional to modern, under different cultural influences, in order to understand the widespread meaning of the modernisation process.[14] In my opinion, there were initially two main faults with modernisation theory. The first is its focus on the non-economical environment of economical development; the other is that it does not consider the unique characteristics of modernisation, but rather its universal features. The purpose of modernisation theory, as Black mentions, is the multidisciplinary study of mankind, with a view to describing in all their complexity the processes of change that are now recognised to be of worldwide significance.[15] Under the same purpose scholars have defined, and are still in the process of defining, the meaning of modernisation according to their different points of view.

What is the meaning of modernisation? The answers to this question are numerous and complicated. C E Black looked at modernisation from a historical perspective. He believed that modernisation is the age-old process of innovation and came about as a result of the explosive proliferation of knowledge in the recent century. It owes its special significance both to its dynamic character and to the universality of its impact on human affairs. It stems initially from an attitude or a belief that society can and should be transformed and that change is desirable. If a definition is necessary, "modernisation" may be defined as the process by which historically evolved institutions are adapted to the rapidly changing functions that reflect the unprecedented increase in man's knowledge, permitting control over his environment that accompanied the scientific revolution.[16]

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[14] Ding Xueliang, The theoretical origin with the concept frame of Modernisation, *Chinese Social Science* (1988) Issue 1, 55.
[15] C. E. Black, *The Dynamic of Modernisation, A Study in Comparative History* (1966), Chapter 5.
[16] Ibid, Chapter 1.

Black's definition stresses the impact of the scientific revolution on social change and the transformation of human life, and also points to its original and initial influence in the societies of Western Europe. Black distinguishes between the two concepts of modernity and modernisation. He believed the former refers to the characteristics common to countries that are advanced in technology, politics, economics, and social development, while the latter is the process by which they acquired these characteristics.[17]

G. Rozmam, a scholar researching Chinese modernisation, succeeded Black's view and thought of modernisation as the process by which societies have been and are being transformed under the impact of the scientific and technological revolution.[18] He stated that modernisation is not equivalent to "industrialisation" or "westernisation". Industrialisation signifies the development of a manufacturing sector, including both heavy and light manufacturing, and while this is certainly one of the processes that occur in modernisation, it is one of many. The tendency to equate industrialisation with modernisation may stem from the use of one element of the process to name the whole. Industrialisation focuses more on the economic transformation caused by the scientific and technical revolution. Additionally, modernisation is not equivalent to westernisation. Westernisation refers to the association of the patterns of modernisation in the countries in which they first developed. These patterns, however, are by no means exclusively associated with the West, nor are all Western countries highly modernised. Therefore, westernization signifies the adoption of distinctively western characteristics.

From a sociological point of view, M.J. Levy defines modernisation as "the uses of inanimate sources of power and the use of tools to multiply the effect of efforts," and within the framework of this broad definition, he is primarily concerned with the basic distinction between relatively modernised and relatively non-modernised societies.[19] Levy's opinion relies on a holistic approach to human action as reflected in organised societies, which enhances the sensitivity of the understanding he conveys for the phenomenon of modernisation. He believed that modernisation, as a universal solvent, is subversive of traditional societies and has a profoundly destabilising effect on developing countries.[20]

S.P. Huntington came from a political point of view, and believed that modernisation is a multifaceted process involving changes in all areas of human thought and activity. The principal

[17] Ibid.
[18] Gilbert Rozman Edited, *The Modernisation of China* (1981), Chapter 1.
[19] Marion ·J Levy, *Modernisation and the Structure of Society: A Setting for International Affairs* (1966).
[20] Ibid.

aspects of Huntington's modernisation include urbanisation, industrialisation, secularisation, democratisation, education and media participation. Huntington believed that these aspects did not occur in a haphazard or unrelated fashion; historically, they went together so regularly because they had to go together.[21]

The aforementioned scholars assign different definitions to modernisation, however they share the common judgment that, as a universal historical process, modernisation is a transformation and a quantum leap from the traditional society to the modern society, and is unavoidable. They also believed that modernisation requires a complete transformation of all the systems by which man organises his society, including the political, social, economic, intellectual, religious, and psychological systems.

In summary, the term modernisation is not only a measure of time which started in medieval times and continues today, but it is also a measure of value that is quite different from the medieval spirit and characteristic.

Firstly, it is a revolutionary concept. Modernisation is a historical subrogation which promotes the modern lifestyle and institutions rather than the traditional lifestyle and institutions. This historical quantum leap caused a huge creative innovation in the whole value of human civilisation. Because the foundations of the traditional and modern societies are completely different, the transformation from the traditional to the modern society involved a radical transformation. Modernisation is also a complicated process. It must be viewed as a process that results in the fundamental transformation of society, economy and politics: all aspects of human thought and behaviour have changed in the process. Consequently, modernisation is a systematic process. Every aspect of the modernisation is closely associated with each other, and changes in one area will cause changes in and impact on other areas.

Secondly, modernisation is a global process. It originated in Europe in the 15th and16th centuries, but is now a worldwide phenomenon. All societies (countries) that have existed, no matter what the developmental road they chose, have already been transformed, or are transforming, from traditional to modern societies. They might have entered into the new developmental orbit proactively, or they may have been changed passively by the spring tide of modernisation.
Thirdly, modernisation is a long-term and continued process. The transformation from the traditional to the modern can take a whole century. The transformation may be divided into different

[21] Samuel P. Huntington, *Political Order in Changing Societies* (1968).

levels or stages; however, it is also a continuing process like a flowing torrential river. Thus, the modernisation process is an organic unification of stage and continuum. Consequently, the process of modernisation is subject to disruption. It requires the capabilities for institutionalising change and providing for the continuous adaptation of society and the political system.

Fourthly, modernisation is a process that makes different societies gravitates towards homogeneity. There are many different types of traditional societies and it could be said that their only commonality is their lack of modernity. In contrast, even though the nature and extent of change from a traditional to a modern society are bound to differ from one setting to the next, modern societies have many common themes and patterns and have a concentrated trend.

Fifthly, modernisation is an irreversible and progressive process. Although some areas or countries may experience temporary frustrations and setbacks during the modernisation process, on the whole, modernisation is a long-term trend in the world. The costs and sufferings can be enormous in the period of transformation from a traditional to a modern society, particularly in the early stages of the transformation. However, the huge achievements in the modern world caused by modern political and economical orders arguably compensate for these losses, not to mention the increases in the cultural and material happiness of the whole of mankind.

In addition, we also should understand that the essence of modernisation is a civilizing process. As a historical process and a social revolutionary phenomenon, modernisation may be regarded as a style of civilisation that represents our historical time. Because modernisation brings with it quite a visible change, people tend to pay more attention initially to the economical development and social innovation stages and ignore the transitional process of political institutions and psychological elements and values. In fact, the necessary associated elements for modernisation also include a spirit of reason, personal, social and economic ethics, not just the elements of economic and social structure.[22] So it could be said that modernisation is a phase of civilization as distinguished from culture[23]

It is important for this research to comprehend how civilisation differs from culture.[24] Firstly, the

[22] Refer to Max Weber, *the Protestant Ethic and the Spirit of Capitalist* (1930). http://xroads.virginia.edu/~hyper/WEBER/toc.html at 28 Nov. 2004.
[23] Oswald Spengler, *Decline of the West* (1991).
[24] Some scholars confuse the concepts of culture and civilisation. For example, Samuel P. Huntington in his *Civilised Conflicts and Restructure World Order* confuses the concepts of culture and civilisation which results in his incorrect conclusions. He believed that the civilisation is the reason for conflicts and violence, but it is not a tool which accelerates development and increases intercourse. Therefore, he declared that the universal civilisation is dashed to the ground. In his point of view, the meaning of the universal civilisation is that human culture is tending towards the same culture. Refer to *Civilised Conflicts and Restructure World Order.*

main attribute of a civilisation is being well-ordered; the opposite of which is the concept of brutishness. The main attribute of culture is knowledge; its opposite being the concept of barbarism. Secondly, civilisation is a process which progresses towards one direction; it is one way and irreversible. Culture is as diverse and multi-faceted as flowers in a wild field. Namely, it is said that the cultural requirement of humans is diversification; however, the trends and natures of humans seeking civilisation are the same. Because the structure of the human brain is the same, people's psychological circumstances are also the same. This is shown in the example of the printing invention that occurred simultaneously in China and in medieval European countries. This is why the same institutions appear in places far away from each other; because the places and time all appear to need the same conditions, which in turn require the same institutions.[25] Therefore, although different cultures produce different civilisations, these different civilisations can be used for reference and can be transplanted onto each other without losing their functions and effectiveness. Culture could not be transplanted, if it would lose its original efficacy. Japan is a good example of this concept. Since the Minch Reforms, Japan began to learn advanced scientific technologies and management experience. Japan became a highly developed civilisation and modern country after more than 100 years' effort. Meanwhile, Japan also maintains a strong Eastern culture. This model shows that there is no direct relationship between different cultures and modernisation. Modernisation is a form of civilisation, and has universal bearings, whereas culture is a kind of local knowledge. It can thus be thought that the transformation from the traditional to the modern is also to transform from local culture to general civilisation.

However, some scholars pointed out the East Asian countries' political moderation have taken different paths, for example is the Republic of Singapore. They thought that liberal democracy is not the inevitable outcome of economic modernization. Focusing on the stable and prosperous societies of Pacific Asia, it argues that contemporary political arrangements are legitimized by the values of hierarchy, familism and harmony. An arrangement that clearly contrasts with a western understanding of political liberalism and the communicatory democracy it facilitates. Instead of political change resulting from a demand for autonomy by interest groups in civil society, the adoption of democratic practice in Asia ought to be viewed primarily as a state strategy to manage socio-economic change.[26]

This thesis is primarily focused on judicial modernisation. Singapore citizens may not enjoy the

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However, in my point of view in this paper, the meaning of the universal civilisation is that civilisation is tending towards the same, rather than the culture tending to be the same.

[25] Luo Rongqu, *From Occidentalizing to Modernisation* (1990) 413.

[26] Daniel A. Bell, David Brown, Kanishka Jayasuriya and David Martin Jones, *Towards Illiberal Democracy,* Palgrave Macmillan (1995).

same degree of individual liberties that is common in Western democracies but Singapore has developed a modern and efficient judicial system that delivers speedy justice and vindicates legal rights according to law. The reliability of judiciary in Singapore is an important attraction to foreign and local investors. Other successful industrial democracies in the Pacific Rim such as Japan, Taiwan and South Korea have been progressively strengthening their judicial system in keeping with economic modernisation. It is acknowledged that many South Pacific island nations have sought to develop their political and legal systems along more communitarian and traditional lines. Two points may be made in this regard.

First, the small island nations are not industrialised. In contrast, China is a growing industrial power. It has a large population a greater proportion of who still live in poverty. China has chosen the path of rapid industrialisation and commercialization as the means of lifting the people out of poverty and meeting the aspirations of the growing population. The economic system that it has chosen requires stable rules, property rights and the rule of law. Hence there is the need for judicial modernisation on the lines of modern legal systems. Second, judicial modernisation, as I argue throughout this thesis, is a demand of basic human rights that are universally recognised. Every nation on whichever development path it travels has a duty to respect these rights according to international law and principles of political morality. The Universal Declaration of Human Rights declares that 'All human beings are born free and equal in dignity and rights'. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[27] Therefore, the meaning of the modernisation is universal civilisation that is tending towards the same, rather than the culture tending to be the same.

It is necessary to point out that, as a theory, modernisation is not only a framework and structure for analysis, but also a theoretical view and abstract of real life. In practice, it is a movement which began in the West and extended worldwide, until the present day when it is continuing to carry through to developing countries.

Chinese scholars, particularly historical scholars, began to research modernisation in the early 1980s; they discussed the theoretical proposition of two types of modernisation: extrinsic and intrinsic.[28] They believed that the social modernisation of China was an impersonal historical process, which did not start in the current age.[29] In practice, Chinese political leaders put forward a political target of the four modernisations in the middle of 1970s, these being: industrial,

[27] *Universal Declaration of Human Rights*, (1948), article 1. http://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights.
[28] Luo Rongqu, *Research on Modernisation* (1997) 169.
[29] Li Xiouling, Li Zunchun, Chen Yanqing, Guo Zhan edited, *Philosophical Study in Chinese Modernisation* (1990) 1.

agricultural, national defence and scientific/technological.[30] But in official Chinese ideology, modernisation was merely regarded as advancing the national scientific and technical levels of achievement and developing the economy, rather than updating the social institutions. The arguments between whether China needs an across-the-board modernisation including political and legal systems or only a scientific technical modernisation have existed since the early of 1900s, and continues to the present day. The mainstream official ideology still insists that modernisation merely relates to scientific technical modernisation and economical development. It rejects the material, political, philosophical and cultural consequences of the civilization that the Western Industrial Revolution inaugurated. Hence it also rejects ideals such as enlightenment rationalism, democracy and the rule of law and commits itself to the revival of Chinese traditional culture (nativism) to counter balance western civilisation.

In my view, this ideology ignores political modernisation and the rule of law which are important concomitants of modernisation. The main problem in my view is the obsession of many Chinese scholars with traditional Chinese culture not only as a counterforce to Westernisation but also a source of inspiration for innovation. This reflects the confusion of culture with civilisation and modernisation, something that the Japanese avoided. Japan successfully retained its core culture while embracing the modernisation process in its technological, economic, legal and political dimensions. Some Chinese scholars have said that every concrete legal provision which is transplanted brings not only a technical change but also imports the unique cultural background behind the provision. This too is based on the mistaken equation of culture and civilisation. Once civilisation and culture have been separated it is easy to see that apart from its cultural element, there is a civilised universal value hiding behind a concrete legal article. Legal civilisation and legal culture belong to different categories when we discuss judicial modernisation. The comparative study of the civilisations in different national cultures is a valuable one. If there was no civilisation, it would be impossible to achieve an accordant target through a comparative study. In other words, civilization as a conversation channel could communicate and pass judgement on the comparative study of different cultures. Many issues in our society contain the dual natures of civilisation and culture, but in fact they can be divided felicitously in discussing the issues.

This kind of classifying leads us to investigate the judicial modernisation synthetically as part of the whole process of a modern civilised development. Although it is impossible in this study to exactly describe the process of judicial modernisation in the development of a civilisation, we can at least view the trends of civilised development. Therefore, we can understand what is able to be changed,

[30] Zhou Nenlai, *Government Working Report in the Forth People's Congress* (1975) 3.

what ought to be changed, what changes can be foreseen and what cannot be changed or is incapable of change. No matter what challenges or problems face them, I do not believe any country, including China, is able to break away from or ignore the universal trends of modern civilised development.

Few scholars use modernisation theory to discuss the legal and judicial modernisation, particularly in relation to modernisation and the judiciary in the civilising process. Legal modernisation is mentioned as being just one part of political modernisation. As discussed above, the essence of modernisation is a civilising process and the rule of law and the modern judiciary themselves form part of modernisation as a whole. They are important measures of the degree of modernisation. Consequently, the essence of judicial modernisation is the progressive achievement of the rule of law. This research will use these ideas to explain the basic framework of the modern judiciary and, as an important part of human civilisation, explain how the judiciary transforms from the traditional to the modern.

2. Political modernisation

It is my belief that the political aspect of modernisation is concerned with the growing capacity of members of a society to mobilise and allocate resources through public and private institutions with the view to implementing the various new possibilities implicit in the advancement of knowledge and technology. Therefore, the central aspect of political modernisation as a historical phenomenon is man's rapidly increasing control over the forces of nature – or rather society's control, for it is achieved not by any individual in isolation, but rather by men in a complex division of labour. Hence, an increased control over the physical environment is accompanied by an increased social interdependence. As Black said, man becomes a master of nature and a servant to other men.[31]

The impact of modernisation on politics is varied. Numerous scholars have described their ideas of political modernisation in even more numerous ways. Here we take Samuel P Huntington's opinion as representative. According to Huntington, political modernisation has three major characteristics:

Firstly, political modernisation involves the rationalisation of authority, the replacement of a large number of traditional, religious, familial, and ethnic political authorities by a single secular, national political authority.

[31] Cyril E. Black, *Modernisation: Essays in Comparative History* (1969).

Secondly, political modernisation involves the differentiation of new political functions and the development of specialised structures to perform those functions. Areas of particular competence – legal, military, administrative, scientific – become separated from the political realm, and autonomous, specialised, but subordinate organs arise to discharge those tasks.

Thirdly, political modernisation involves increased participation in politics by social groups throughout society. In all modern states the citizens become directly involved in, and affected by, governmental affairs.[32]

However, modernisation involves a change in the size of the effective political unit. In the practical process of modernisation, the goal of political modernisation is the development of an institutional framework that is sufficiently flexible and powerful to meet the demands placed upon it. With the transformation from the traditional society to the modern, the government has to become fully capable of performing a wide variety of duties. Its capacities must increase, so that change can be accommodated within the political channel. Therefore, we could say that political modernisation is linked with economic growth and with social and psychological changes. The capacity of a government to deal with demands is affected by economic and cultural factors.

It cannot be ignored that certain psychological attitudes are also of prime importance for political modernisation. Modernisation, as Charles Frankel has observed, changes the concept of 'social time'.[33] Modern people are impatient people who want change now or, at the latest, within their generation; they firmly believe that today's society and tomorrow's technology can produce changes unthinkable in bygone days. The modern citizen is not only interested in playing an active role, but also joins a political association or supports a political group for the sake of specified aims and concrete benefits. The modern political spirit is thus secular and pragmatic, and bargaining is its most favoured technique.

As we have seen, the political system is highly complicated in the modern society. Because political modernisation multiplies the volume, range, and efficiency of official decisions, in order to meet the complex tasks placed upon them, the organs of government become highly differentiated and functionally specific. A modern polity may be said to be characterised by:

1) A highly differentiated and functionally specific system of governmental organisation; 2) A high

[32] Samuel P. Huntington, *Political Order in Changing Societies*, New Haven and London (1968) 34 – 35.
[33] Charles Frankel, *The Democratic Prospect* (1962)13 – 20.

degree of integration within this governmental structure; 3) The prevalence of rational and secular procedures for making political decisions; 4) The large volume, wide range and high efficacy of its political and administrative decision; 5) A widespread and effective sense of popular identification with the history, territory, and national identity of the state; 6) Widespread popular interest and involvement in the political system, though not necessarily in the decision-making aspects thereof; 7) The allocation of political roles by achievement rather than ascription; and 8) Judicial and regulatory techniques based upon a predominantly secular and impersonal system of law.[34]

In summary, firstly, political modernisation involves a dramatic shift in the locus of authority. Religious, traditional, familial, and ethnic authorities are supplanted by a single, secular, national political authority.[35] Secondly, political modernisation multiplies the volume, range, and efficiency of official decisions. To meet the complex tasks placed upon them, the organs of government become 'highly differentiated' and 'functionally specific'. The third aspect of political modernisation is that popular attitudes must be transformed and the nature of political participation changed. This participation comes in part through the growth of political parties and interest groups.

B. The Meaning of Judicial Modernisation

After discussing the basic meaning of modernisation and political modernisation, an important mission is to understand judicial modernisation and its foundation – the rule of law.

Through the analysis of modernisation, we can make a basic estimation that as a society transforms from the traditional to the modern, the judicial system also faces a historical revolution, which transforms it from a traditional pattern to a modern one. This process of transformation is judicial modernisation.

In my view, the characteristic features of judicial modernisation are as follows.

1. A historical trend of judicial modernisation

Judicial modernisation is a quantum leap in the human legal civilisation, which causes a new creation in the value system of the whole legal civilisation. Historically speaking, legal phenomena are not concrete, but are in continual movement along with the development and changing of social,

[34] Robert E. Ward & Dankwart A. Rustow Edited, *Political Modernisation in Japan and Turkey* (1964)7.
[35] Samuel P. Huntington, Political Modernisation: America vs. Europe, *World Politics*, XVIII (1966) 378.

economical, political and cultural phenomena. The process of human civilised development has formed different legal and judicial patterns.

The traditional judicial pattern is established on the foundation of human dependent relations. In this social atmosphere, individuals lack independence, in fact, dependence is the basis of people's social relations.

Judicial modernisation, however, is a profound revolution in the progress of human civilisation. As discussed above, modernisation does not only create a new governmental model, but also a new social and economical framework, a new idea of social community and a new legal structure, as well new universal values and faith. With respect to the judicial revolution, the essence and framework of the traditional judicial institution has changed completely; new values and standards of judicial justice and its operating system have been established. Accordingly, the modern judicial system can supply efficient institutional support to the new system of social life.

Why do we describe judicial modernisation as a profound revolution? The main reason is that it reflects a stirring picture of judicial transformation from the traditional society to the modern. It is the complete upheaval of the traditional arbitrary authority, and the establishment of a system in its place that respects human value, human rights, and guards the liberties of its social members.

2. The basic nature of judicial modernisation

Judicial modernisation is a transforming process from a society of the rule of man to a society of the rule of law. The process of historical subrogation from a traditional judicial pattern to a modern one is quite complicated. However, the rule of man and the rule of law can represent the dividing line between the traditional judicial institution and the modern judicial institution, and also compose a basic measure to distinguish the two kinds of judicial values; the modern judicial system is connected with the rule of law, while traditional judicial systems involve the rule of man. Therefore, we can use the increase in the rule of law and the reduction in the rule of man as a means of evaluating the process of judicial modernisation.

In the West, modern judicial systems, and by default the rule of law, formed in those countries that were modernised. The rule of law and the modern judicial system are two of the most important outcomes in the process of modernisation. They guard modern society and ensure that the economy and polity perform in an orderly and efficient way. Consequently, the level of the rule of law in a

society can be viewed when evaluating the degree of judicial modernisation in that society; a country that has a modern judiciary should certainly be a society governed by to a high degree according to the rule of law.

As the fundamental nature of judicial modernisation, the rule of law deems that the people and the government shall be ruled by, and obey the law, and that the law should be such that people are able to be guided by it.[36] From these two propositions, Walker draws the following the basic characteristics of the rule of law.

1) Laws against private coercion. There must be substantive laws prohibiting private violence and coercion and be of such a character as to give the citizen protection against general lawlessness and anarchy.

2) Government under law. The government must be bound by substantive law, not only by the constitution, but also as far as possible by the same laws as those which bind the individual.

3) Certainty, generality and equality. The substantive law must be guided by the principle of 'normativism'. This notion means that the substantive law should possess characteristics of certainty, generality and equality.

4) General congruence of law with social values. There must be some mechanism for ensuring that the law is, and remains, reasonably in accordance with public opinions.

5) Enforcement of laws against private coercion. The fundamental requirement here is for institutions and procedures that are capable of speedily enforcing the substantive laws to prohibit private violence, coercion, general lawlessness and anarchy.

6) Enforcement of government under law principle. There must be effective procedure and institutions, such as judicial review of executive action, to ensure that government action is also in accordance with law.

7) Independence of judiciary. An independent judiciary is an indispensable requirement of the rule of law and indeed of all known methods of controlling power.

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[36] Walker, Geoffrey de Q, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne University Press, 1988, pp 23.

8) Independent legal profession.

9) Natural justice, impartial tribunals. The principles of natural justice, as that term is understood in law, must be observed in all trial.

10) Accessibility of courts. The courts should be accessible to all, so that a person's ability to vindicate legal rights is not made illusory by long delays or excessive costs.

11) Impartial and honest enforcement. The discretion of law enforcement agencies or of other government officials or of political officeholders should not be allowed to pervert the law.

12) An attitude of legality. This is to remind us that the health and strength of the rule of law does not ultimately depend on the efforts of lawyers, judges or police, but on the attitudes of the people.[37]

As discussed above, the rule of law appears in society through a series of institutions and procedures, in particular a modern judiciary. Undoubtedly, the rule of law is good for everyone and every country. As can be seen by the first listing in the 'Declaration of Democratic Values' issued by the seven heads of states of the major industrial democracies: 'We believe in a rule of law which respects and protects without fear or favour the rights and liberties of every citizen and provides the setting in which the human spirit can develop in freedom and diversity'.[38] In the West, it is common knowledge that the defining characteristic of political tradition is 'freedom under the rule of law'.[39] In the present age, many governmental heads from different countries support the rule of law, for example, Russian President Putin 'continues to place judicial reform and the full implementation of the principles of the rule of law among the country's highest priorities'.[40] Additionally, in China, the third amendment to the constitution was adopted by Chinese government in 1999, which provided: 'The People's Republic of China governs the country according to law and makes it a socialist country ruled by law'.[41]

By studying modernisation we can further understand the differences between the rule of law and the legal system.[42] The first difference is that they consist of different elements. The rule of law consists of basic elements or principles, known as 'the pivotal principles of law', such as there is no

[37] Walker, Geoffrey de Q, *The Rule of Law: Foundation of Constitutional Democracy* (1988) 24 -41.
[38] "Declaration of Democratic Values", reprinted in *Washington Post*, 9 June 1984, A14.
[39] Judith N. Shklar, *Legalism* (1964) 22.
[40] "Gulags Give Way to the rule of Law", by Robert Cordy, *Boston Herald*, 18 November 2002, A25.
[41] *Amendment to the Constitution of he People's Republic of China* (1999) Article 13.
[42] In China, "the rule of law" and "the legal system" is the same pronunciation: "Fa Zhi". "法治" (*Fa Zhi*) has been translated as "the rule of law"; "法制" (*Fa Zhi*) has been translated as "the legal system".

penalty without a law; equality before the law; and independence of the judiciary. The rule of law also focuses on basic, long-term and synthetic benefits; therefore, the legal system is corrected and bound by the rule of law. Regulations become invalid if they conflict with these principles. The legal system, however, consists of basic elements called regulations. Since the regulations cannot be completely decided and controlled by the principles in some countries,[43] it is possible that the regulations could be opposite to the principles.

Another difference between the rule of law and the specific legal system is that they have different basic attributes. The main attribute of the rule of law is civilisation. The rule of law has been established in modern countries and it is proved that it is one of the most important components of a modern civilisation. Conversely, the main attribute of the legal system is culture. Therefore, even though many countries are ruled by the law, their legal systems may be very different, for example the common law systems in England, America and Australia, as opposed to the civil law systems in France and Germany. Likewise the legal systems of traditional and tribal societies reflect the unique features of those cultures.

One of the main characteristics of culture is that it is different everywhere. Conversely, the characteristics of civilization depend on its universality and its ability to be transplanted without localisation. The development and practice of the rule of law reflect the characteristics of civilisation. The developmental history of the rule of law shows that it is contributed to by many countries and nations in the long historical process of transformation from the traditional (culture) to the modern (civilisation), and that its institutions accumulate and develop gradually.

The changes of those legal systems that consist of regulations were very slow. Although they have been exchanged and infiltrated among different countries, their influence on each other was limited; modernisation changes this. The Industrial Revolution brought about free markets, economic and technological progress, social and institutional changes and a new ideology of liberalism. These changes necessitated a new legal ideology and a new judicial model. Therefore, it can be said that the process of judicial modernisation was also the process of the development of the rule of law and the transformation of national judicial systems from culture specific orientation to the more universal values of civilisation.

In my view, modernisation does not just mean economic development or a modern (or free market)

[43] Such as in China, on one hand, the constitution stated that the citizens have rights to freely parade, demonstrate and speech. On the other hand, the government also adopted *The Regulation of Security Administrative Punishment* to actually abolish these rights.

economic system. It also refers to a modern political and legal system. In fact, the modern economical institutions could not have been built without the modern legal system and judiciary. In a modern society, the rule of law depends upon an impartial judiciary. Citizens, as a last resort, look to the courts to uphold their rights, and to enforce their lawful claims against other citizens or governments. Governments also look to the courts to enforce the obligations of the citizens.[44]

3. The evaluation's standard of judicial modernisation

As discussed above, the nature of judicial modernisation is a historical revolution, transforming from the traditional rule of man to the modern rule of law. Therefore, establishing a standard to evaluate the level of judicial modernisation must relate to the rule of law. The emergence of the rule of law resembles a tropism of fundamental value in the course of legal evolution. The rule of law reflects a basic target in the progress and transformation of legal and judicial institutions of human civilisation, and incarnates the valuable ideal of human striving for legal and judicial transformation.

The significance of using the rule of law as a reference point and a valuable measure of judicial modernisation may be stated as follows. (1) The law and judiciary is a basal regulator of the modern social relations. Its target is to reasonably adjust the relations between the individual and the society, the individual and the state and, on this basis, establish an effective legal mechanism to put social lives in order. (2) The law and the judiciary are mechanisms of restriction to inhibit state authorities from infringing citizens' rights and liberties. The law and the judiciary safeguard citizens' rights. The practical experience of legal development and judicial modernisation has indicated that the reigning model of the rule of law is the only acceptable institutional style for guarding and guaranteeing the citizens' rights and liberties.

4. The connotation of judicial modernisation

Judicial modernisation is a developmental process that includes legal and judicial thoughts, legal and judicial actions, and legal and judicial practices. However, the key point in the process is the people's modernisation. In the practice of modernisation, certain psychological attitudes are also of primary importance, because, as previously discussed, modernisation changes the concept of "social time".[45] Modern people are impatient people, and they are also people who join political associations or support political groups for their own benefit. From this angle, judicial

[44] Murray Gleeson, *The Rule of Law and the Constitution*, ABC Book, 2000
[45] Charles Frankel, *The Democratic Prospect* (1962) 13.

modernisation is firstly the modernising of the people who campaign for the transformation, and involves the process of the transformation of people from the traditional legal conception and model to the modern legal sense and action model.

In my perspective, judicial modernisation includes the modernisation of the judicial institution and judicial opinion. However, the two sides cannot develop without the popular cultural modernisation, because the modern institutions and management methods would be a waste in the hands of traditional people.[46] A country whose citizens do not trust the judiciary and who despise law could not hope to achieve judicial modernisation. Therefore, the people's modernisation is not a by product from judicial modernisation, but a primary precondition for achieving judicial modernisation and developing a modern judiciary. Modernisation of the judiciary relies on the modern diathesis – opinion of value, model of action, style of thinking, intent of feeling and characteristic of personality – of the people who are operating the institutions. In other words, no matter how modern the legal institutions are in a country during the process of judicial modernisation, if the people operating these institutions have not transformed from the traditional to the modern in psychology, attitude and behaviour, these institutions as well as the judicial system will have an ill-deserved reputation. Therefore, we can deduce that judicial modernisation is also a kind of spiritual phenomenon and is a process of the people's legal values and action models transforming from the traditional to the modern.

5. The development model of judicial modernisation

Judicial modernisation is both a multiform and a uniform process of legal development. In the world, the development levels of different countries' economies, culture and thought are quite varied as are their state institutional arrangements. Added to this is the fact that every country has its own history, customs, ethnic traditions, geography, natural environment and population. These complicated elements will cause the movements of judicial modernisation to have rich and colourful characteristics in different countries.

On the other side, the global social, economical and cultural developments have resulted in the opening of the doors of the world's many countries, which has caused the historical characteristics of legal development in different countries to weaken, and has led to judicial modernisations moving towards a uniform trend.

[46] Yi Lujun, *People's Modernisation* (1985) 4.

One of the key objectives of this research is to investigate the similarities among the multiform developments of judicial modernisation; to examine the universal rules of judicial modernisation from the many phenomena of legal development. Here the difference is the basis of oneness, because of the universal elements existing among the individual trends; moreover they come true through the individual development. In addition the oneness of judicial modernisation movements is an inevitable representation of multiform developments. Otherwise we could not explain the reason why modern judiciaries in different countries have similar characteristics and also why the rule of law can be accepted worldwide.

C. The Definition of the Modern Judiciary

In professional terms, the concepts of the court and the judiciary were accepted in China in 1906.[47] Therefore, like many other modern institutions, these concepts take their root in the West. Because there is no definition of the judiciary in the Chinese Constitution, people have very different comprehensions of the concept of the judiciary in China to the Western nations. Generally speaking, the difference lies in is how to recognise the judicial organ, the judicial functions and judicial authority.

Firstly, the meaning of the judicial organ in Western countries is to point to the court. This concept is represented in constitutions and is reflected in scholars' books.[48] In China, however, the judicial organ consists of the courts, the procuratorates, the public security organs and the national security organs, as well as the justice administrative organs.[49] Secondly, in common law countries, the judiciaries have the important function of making the law through the precedents.[50] In China, however, the courts have only authority to try cases. Thirdly, the judicial authority in Western countries includes trial authority, legal interpretative authority and the judicial review authority.[51] In China, the court authority is only trial authority and the legal interpretation authority involved with trial work.[52]

In this paper, I use the concept of the judiciary as the same as the court and its activities. The court

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[47] Lu Minjian, *Chinese Judicial System* (1996)2. Zhang Baifeng, *Judicial System in China* (2000)12.
[48] *Constitution of the United States of America*, Article III, Section 1. Sury Ratnapala, *Australian Constitution Law*, (2002)118. *Concise Australian Legal Dictionary* (1998)250.
[49] *Chinese Great Encyclopedia: Law Section*(1990)550.
[50] M.A. Glendon , *Comparative Legal Traditions in a Nutshell* (1993)155. Sara Biddulph, Australian legislative System, *Study in Administrative Law* (China) (1995), Issue 1, 89.
[51] Dennis Woodward, Andrew Parkin and John Summers edited, *Government Politics Power &Policy in Australia* (1999)113. Wang Mingyang, *American Administrative Law* (1995)565. Peter Leyland, *Textbook on Administrative Law* (1999)141. In France, however, there is a system of administrative courts and the Constitutional committee. In Germany, there is a constitutional court. These exercise judicial review authorities.
[52] *Constitution of People's Republic of China* (1982),Article 123. Zhang Baifeng, *Judicial System in China* (2000)17-21

will be argued to be the sole judicial organ that is to be a hoped-for goal and the best choice for Chinese judicial reforms.

The modern judiciary is established on the constitutional foundations of the following principles: the principle of governing by the people (the source of the state powers), the principle of separation of powers and checks and balances (the allotment of the state powers) and the principle of judicial independence (needed to ensure that the state powers are used according to law, to protect citizens' rights and to maintain the balance between the state powers and the human rights).[53] In modern countries, the characteristics of judicial authority are neutrality, justice and independence.[54]

However, from a historical point of view, some important concrete institutions of the modern judiciary originated initially from English practice.[55] Hamilton and the Federalist made a significant contribution to the principles of the modern judiciary stipulated in American constitutional law.[56] Because Hamilton and the Federalist focused on how to effectively prevent autocracy, and to ensure checks and balances between the three powers of the state, they designed a unique institutional arrangement including a modern judiciary for the new country. Therefore, their theories have more reasonableness and stronger practicability, and those principles are becoming a vital part of the modern judiciary in modern countries.

From a practical angle, I believe that the separation of powers not only depends on the social function, but also involves different virtues of people. For example, the legislation must strive to be representative of popular opinions, the administration must seek efficiency and integrity, and the judiciary must exercise cautiousness in balancing the rights and benefits of its citizens.
In summary, a modern judiciary will display the following characteristics.

1) A highly differentiated and functionally distinct court system which is separate from legislative and executive power; 2) A high degree of independence of the courts and judges *de jure* and *de facto*;[57] 3) Substantial rational legal procedures for the making of the courts' decisions; 4) Judicial judgments based upon a certain, prospective, efficacious, predominant and self-governing system of law; 5) Widespread and effective checks and balances operated by the court system; and 6) Highly qualified and professionally skilled judges.

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[53] J.M.Burns, J.W.Peltason & T.E.Cronin, *Government by the People* (1990) 40 – 67.
[54] Roger Cotterrell, *The Sociology of Law: an Introduction* (1984)236.
[55] Peter Leyland & Terry Woods, *Textbook on Administrative Law* (1999)20.
[56] Alexander Hamilton, John Jay & James Madison, *The Federalist, A Commentary on the Constitution of the United States* (1979).
[57] *De jure* independence refers to the independence of the courts as it can be deduced from constitutional and legal documents. *De facto* independence refers to the degree of independence that the courts actually possess.

Naturally, no judiciary displays all of these qualities or traits in a pure, complete or exclusive form; even the most modern judicial system retains some pre-modern or traditional elements. The monarchical institution of Britain is a good illustration of this, until the enactment of the Constitutional Reform Act 2005 (UK),[58] as the House of Lords has the dual authority of exercising both judicial and legislative power. Additionally, no states are completely untouched by the modern judiciary in today's world. Therefore, strictly speaking, the judiciary of every country could be said to offer a mixture of modern and traditional features. However there are obvious and vast differences in the proportions and interrelations of the ingredients in different countries. In some countries, the mixture of the judicial elements weighs heavily on the traditional side, such as in North Korea and Burma; while in others, it represents a pattern of innovation and modernity, such as in America and Australia.

[58] Peter Leyland *The Constitution of the United Kingdom* (2012)

CHAPTER 3: COMPARISON OF TRADITIONAL AND MODERN JUDICIAL MODELS

An effective modern judicial system displays four major elements. The first is the element of structure. How well is the judicial system separated from other government agencies, how independent is it and how rational is the procedure of trial? The second element is that of substance or the reasons behind judicial verdicts. Next is the element of subject or judicial personnel, meaning the professional status of the judges. Finally, there is the element of function, which refers to how the judicial system objectively satisfies the needs of survival and development of all parties in the society.

Generally speaking, the static state of a judicial system, which is basically its framework, is composed of the structure and substance elements. Conversely, the dynamic picture of a judicial system, the system's flesh and blood, is reflected by the elements of subject and function.

It is probable that, through research and analysis, we will find a number of differences between the traditional and the modern judicial systems. The starting point for this research are the four elements of a judicial system.

A. Separation of the State Powers

1. Division of functions and power

Division refers to when those activities, functions and powers in a society that have sociological meaning are separated, and these activities are performed by different subjects. According to the theory of modernisation, one of the biggest differences between the traditional and modern society is the levels of division in the structure and the specialisation of its functions. In traditional society, from the sociological point of view, the level of internal division is comparatively low; there are fewer distinct roles for individuals or organisations. In cases where there are distinct roles, these are limited with little diversity in their functions. The traditional society was one of agriculture; the stability of local groups, limitation of travel, simplification of job categories and similar 'universalism' were features of this society. In contrast, in a modern society there are larger internal

divisions; there are many different roles in society and usually each party acts in multiple roles. In this society, family or other basic groups that have distinct features are organised by purpose, and they are replaced or replenished by secondary 'associations' with specialised functions. In this case, the modern society came from an original nepotistic hierarchy. The movement of people both geographically and sociologically led to many self-governing and specialised organisations.[59] The process of social development should be regarded as a process of positive division between the structure and the specialisation of functions.[60]

Politicians differ in their views of modernisation. They tend mostly to view the concept as a division of the political structure and increasing numbers of participants in politics. American scholar G.A. Almond proposed that there are three elements of modern politics: the division of the political structure, a self-governing system and cultural localisation.[61] Cyril E. Black proposed a more comprehensive theory of modern politics when researching the political modernisation of Japan and Russia. Black determined that having highly divided government agencies with specialised functions was the crucial element.[62] Additionally, Professor Samuel P. Huntington, the authority in this area, highlighted three criteria for political modernisation: the rationalisation of power, a division in the functions of politics and a vast number of participants.[63] Based on the aforementioned research, it is clear that one of the most important differences between traditional and modern politics is the level of division in the roles and functions of the government. In the traditional society, there was no division in the structure of politics; the roles were simple, the functions were similar and they were generally exercised by a single party or a small group. Huntington used medieval Europe and the time of the Tudors as examples of traditional political systems. In these times there was an absence of a highly divided governmental agency and the one organisation usually had several types of responsibilities. However, one single power might be exercised by several agencies. For instance, the British government in the time of the Tudors had multiple powers and multiple responsibilities.[64] This system differs from the modern society, where the political system is highly separated and the roles are diverse and specialised. Almond identified six political subjects common to the majority of modern political systems: beneficiaries, parties, the legislative department, the administrative department, government officials and courts.[65]

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[59] C. E. Black, *The Dynamics of Modernization, A Study in Comparative History* (1966) 9 – 34.
[60] Din Xueliang, *The Source and Concept of Modern Theory* (1988) Issue 1.
[61] Gabriel A. Almond and G. Bingham Powell, Tr. *Comparative Politics, System, Process, and Policy* (1978) Chapter 3.
[62] Cyril E. Black, *The Modernization of Japan and Russia, A Comparative Study* (1975) Chapter 1.
[63] Samuel P. Huntington, *Political Order in Changing Societies* (1968) Chapter 1.
[64] Ibid.
[65] Gabriel A. Almond and G. Bingham Powell, Tr. *Comparative Politics, System, Process, and Policy* (1978) Chapter 3, Little, Brown and Company, Boston, 1978.

Definitions of modernisation given by sociologists and politicians are not the same; however, they share the view that modern political systems have a division in structure and a specialisation of responsibility. The defining feature of the modern society and government is that all of society, both the individuals and the organisations, are highly divided and have their own responsibilities, as do the government agencies and the specialised organisations. In the traditional society, there is no, or limited, division of structure; this is still the case in a number of 'traditional' countries. Power is exercised either by a single party or by several parties without any division in their responsibilities. Although governmental agencies may have differing powers, the differences are in the level of power and not the nature.

The levels of division in the structure and the specialisation of responsibilities in a society's political system may be used when comparing the traditional judicial system with the modern. The reason for this is that the judicial system is an important facet of the political system, and the division of its functions and the formation of its roles may be subject to the political background. Put simply, the judicial system is an important part of the political structure. Whether responsibilities in trial are divided or whether they are exercised by different parties, is one of the criteria used when comparing the modern and the traditional judicial systems.

2. Rationale of the system and forms of structure: comparison of the situations of division

We can observe the difference between the two types of judicial systems through the following elements:

a. The rationale of the system

The rationale behind the political system of a modern society, including the judicial system, is different from that of a traditional society. Firstly, in a modern society, different methods are used to divide governmental functions. Mainstream opinion holds that in a modern society the government's powers should be divided into the legislative, the executive and the judiciary, according to the characteristics of those powers.[66] Therefore, the division is effected even though the powers are still actually powers of the state. In British constitutionalist M. J. C. Vile's opinion, the above idea was the truth or the 'law' of sociology.[67] This theory is based on the recognition that different types of governmental activities have unique functions. In other words, the legislative, the

[66] Suri Ratnapala, *Australian Constitution Law, Foundation and Theory* (2002) 99 – 115.
[67] M. C. Vile, *Constitutionalism and the Separation of Powers* (1998).

executive and the judiciary are different in the aspects of content, formality and method, and this is the objective basis of the 'separation of powers'. The contribution of Montesquieu to judicial studies is significant. He was the first to define the judiciary as the power to control and punish crimes or to solve disputes between individuals. He also highlighted the two other branches of government, the legislative and the executive. He believed in the importance of creating these three separate branches of government with equal but differing powers. In this way, the government's powers should be divided into the law making, the law enforcement and the law interpretation.[68] Therefore, a very important rationale in the establishment and maintenance of the modern society is that the features of powers are the objective basis for the division of governmental activities.

In the traditional society, the idea of 'separation of powers' is not a recognised theory, nor has it become a mainstream opinion.[69] In many traditional societies the main political theory was absolutism, that is, there is a single omnipotent power in charge. In countries practicing absolutism, powers must be centralised in the sovereign. This can be seen in both the Occident and the Orient. In ancient Athens and ancient Rome, powers were separated to some extent but were not officially divided; the concept of the separation of powers was not yet in full existence. Supporters of traditional politics believe that governmental powers should be treated as a whole and cannot be divided, however, this does not mean that there was no division in powers. Maximilian Weber believed that in hereditary or feudal societies such as medieval France, the sovereign was confined under the feudal hierarchy, especially with respect to privilege. Weber, in his book *Economy and Society*, remarks that the division of the sovereign's powers according to the features of the powers is a concept found only in a modern society.

However, there are some thoughts about the division of powers in traditional society. Scholars often explored this theory from many different angles. In ancient Greece, Aristotle proposed some ideas, while researching governmental activities, which were similar to the premise of the court system in modern society. He divided politics into two parts: the legislative (law making) and the theory of politics or strategy (behaviour and thinking). He then subdivided the second part into the subjects of rationale and the judiciary. Based on that theory, he identified that every government must have three branches: the rationale, the executive and the judiciary. Later, in the 14th century, Marsilius of Padua gave his theory on the separation of powers; he divided the powers into the legislative and the executive. The executive power in Marsilius' theory was, as Vile said, essentially the judiciary

[68] Baron de Montesquieu, *The Spirit of Law* (2002).
[69] It was proved by M. C. Vile that the theory of 'separation of powers' was born and developed in the United Kingdom during the civil war and republic government. Although this theory cannot be attributed solely Montesquieu and J. Locke, their influence cannot be ignored.

power, where the sovereign leads the courts and enforces the laws.[70] Thus, we can see that traditional society had theories of the separation of powers. Moreover, before the theory of separation of powers, there was another point of view on the diversity of governmental activities. This theory separated government activities into six or seven categories, such as the manipulation of the mint and the standardisation of weights and measures. The problem with this opinion was that it did not become a mainstream theory.

Another major difference between traditional and modern society is the judgment on the necessity of division. The separation of powers is directly, or indirectly, related to the theory of dividing authority, a concept that is very popular in modern society. The basic purpose of the separation of powers is to establish and protect political freedom. When the law making and law enforcement powers are held by the same person, the concept of liberty is non-existent. According to Montesquieu, different branches of the government can limit the power of the other two branches and therefore, no branch of government can threaten the freedom of the people. Vile also noted that dividing the government into three branches was necessary for the division of functions and the specialisation of responsibilities. In other words, different values should be represented by different agencies and these agencies should stand for different groups pursuing their own interests.[71] When analysing the reasons for the increase in the number of divided and specialised governmental agencies throughout European history Huntington suggested that the separation of powers was established to meet the increasing requirements from society and its people.[72]

The chief reason for the judiciary's separation from governmental agencies, or at least its equality to the executive and ability to limit the power of the legislative, is the function of the limitation on powers that the modern judiciary has, which will be discussed in detail later. If this were not the case, even though the judiciary is separated from other branches, it would still be in doubt as to whether it is equal to the executive and legislative.

Modern society has a final distinguishing feature relating to the separation of powers. Modern society emphasises that there must be a dual division, between both the structure and the responsibility. On one hand, it creates separate branches of government and on the other, based on the three different functions; it places these powers with the separate branches. Absolute dual separation is typical but not practical, and therefore a relative separation model must be used. In this model, the powers are placed with the three branches but not on a monopoly basis. In some cases,

[70] M. C. Vile, *Constitutionalism and the Separation of Powers* (1998).
[71] Ibid.
[72] Samuel P. Huntington, *Political Order in Changing Societies* (1968) Chapter 1.

one branch would be allowed to exercise another's function. For example, if the executive is able to solve disputes, the legislative would authorise the executive to do so, or give legal permission by making laws. Even so, the separation of powers is an important thought in modern society but is not in traditional society.

b. Forms of judicial structure

i. Specialisation of the purpose. Specialisation means that the courts treat solving disputes as their sole responsibility: trial (judicial determination after inquiry) is the basic task. Modernised courts adhere strongly to this model. Traditional courts, on the other hand, usually have multiple functions and goals. The direct purpose of modernised courts is, sociologically speaking, to solve disputes, although they may be specialised into different branches of the law. The routine work in the courts is taking care of cases, an opinion that is recognised by the law and supported by scholars.[73] This is a view also held by most countries now, both in legislation and in practice. According to Article 3 of the Constitution of the United States of America, judicial power vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. Similarly, s 71 of the Australian Constitution vests judicial power in the High Court, other federal courts and State courts in which Parlialiment invests judicial power. There are substantive and procedural limitations concerning the capacity of a citizen to invoke the judicial power of the courts. For example, the litigant must have requisite standing, must bring the case within the limitation period and institute the action in the proper court.[74]

In contrast to the modern courts, traditional courts have responsibilities besides solving disputes; they may also handle matters such as revenue collection, the provision of and social security and the granting of licences or permissions. In a traditional society, there is no governmental agency whose only role is to solve disputes. Nor is there any one agency that treats solving disputes as their main function. Most of the governmental agencies involved in the judicial procedure have multiple responsibilities. Therefore, the so-called court in traditional society is not the professional and specialised court of a modern society. For example, in medieval Europe, rights of feudal lords to land was connected firmly with the power to judge, such that legislative and the executive powers were combined with the judicial and these powers were exercised by an agency called 'court'. However, using this name instead of 'the legislative' or 'the executive' did not mean that the other two functions were less important. In this regard, the difference between the concept of

[73] Roger Cotterell pointed out that it was almost common sense that the major function of the courts is to deal with legal actions. Roger Cotterell, *The Sociology of Law: An Introduction* (1984).
[74] Constitutional Amendment, *the Constitution of the United States of America* (1791), article 5&6.

'government' in the 12th century and that of the 20th century is not whether there is legislation or administration. There are two differences in fact. The first is that in comparison with the way powers are separated now, the governments had these functions in the 12th century but they were mixed. Secondly, in the 12th century the legislative and the executive were included in the judiciary.[75]

However, the modern court is not absolutely specialised. Courts sometimes have other duties, but these do not affect the normal functioning of the court. These other duties might include non-legal actions where there is no contest, such as a registration of agreements, overseeing the administration of estates and sometimes being the registry for births and deaths. According to Friedman, the above supports the routine work of recording responsibilities of courts.[76] The existence of these functions does not mean the courts are not specialised, these are only subsidiary and are not the centre of the courts' concern. This is in complete contrast to the traditional judicial system where it is unclear as to what functions are the major ones. The reasons for the multiple functions and, as such, the complicated functions that public authorities have in traditional society would assist in the researching of this topic.

ii. The monopoly of solving disputes. In modern society, it is the court, on behalf of the government, that is the only or main organ for solving disputes as well as for interpreting and maintaining the constitution. Courts have the monopoly on solving disputes both in theory and in legislation. Of course, the disputes must be able to be solved using legal procedures, that is, there must be an actual justiciable dispute.[77] As far as the monopoly is concerned, the French Constitution, which was adopted after the Revolution in 1791, may be upheld as a typical model. This legislation forbids the parliament and the government from exercising any judiciary functions and also treats the judiciary as equal with, but having different powers from, the legislative and the executive branches

With regard to the above, the political system in America might be regarded as an ideal model. For several years after the United States of America was founded, James Madison strongly objected to placing all of the powers with one governmental agency. At the same time, he did not object to having an agency exercise some powers that belonged to other departments. It was clearly indicated by law that solving disputes with legal procedure was the responsibility of the courts and issues in diplomacy or politics were not. Since the 20th century the executive authority has been expanded.

[75] Harold J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (2004).
[76] Lawrence M. Friedman, *the Legal System: A Social Perspective* (1975).
[77] Traditionally it is mainly the criminal cases and civil cases.

The importance of the powers of the executive department, enforcing law and verdicts within its area, are now regarded as equal to the legislative and the judiciary.[78] In practice, the executive tribunals exercise quasi judicial power frequently in disputes of both civil rights and rights against government. It was initially established by the decision of the Supreme Court of the United States in *Crowell v. Benson*[79] that disputes of the private rights to workers' compensation can be sent to the executive department, as long as there is judicial review. In 1969 the legislature in the state of New York deemed that it was no longer the courts' monopoly to handle criminal cases and that some misdemeanor cases should be handed over to the executive. Although this kind of authority is exceptional, it has been anticipated by many scholars.[80]

Thus, there are great differences between traditional and the modern society with respect to the structure and functions of courts. Features and issues that the modern courts deal with are not seen in traditional courts; the issue of the monopoly mentioned above is an example. With no specialised court for solving disputes in the traditional society, the separation of judicial power from other branches could not be achieved.

iii. Construction of the judicial system. A distinguishing feature of the modern judicial system is the existence of a well organised and constructed judicial system. The construction of a judicial system is, essentially, the requirement and the result of modernisation, because the increasing level of power centralisation is a feature of modern society.[81]

One of the features of a political revolution in a modern society is the enlargement of the political arena by centralising of powers.[82] As Huntington noted after studying European history, modernisation is a process which sees a simple and united government replace a complicated feudal system, thereby placing local affairs under the supervision or control of a centralised government.[83] This then leads to the establishment of a judicial system with a specialised central court, and smaller, local courts under its appellate control. Therefore, the modern judicial system is a well-organised hierarchy with different levels of courts that are connected by supervision from higher levels to the lower levels; it is a standing department like other governmental agencies. As the centralised subject to enforce laws, the judicial system must be at the centre of the polity. It not only protects people's private rights but also enforces the penal law and legally recognised responsibilities of the citizen.

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[78] Bernard Schwartz, *American Legal History* (1947).
[79] Crowell v. Benson, 285 U.S. (1932).
[80] Wang Minyang, *American Administrative Law* (1995) 311- 315.
[81] Samuel P. Huntington, *Political Order in Changing Societies* (1968) Chapter 1.
[82] Jian Chendan & Chen Yixing, *The Road to an Modern Country* (1987) 58.
[83] Samuel P. Huntington, *Political Order in Changing Societies* (1968) Chapter 1.

In the traditional society, there are many forms of government. Generally, the two main forms are power-centralised bureaucracy and feudalism with a form of the separation of powers. Examples of the former are the Roman Empire and ancient Ethiopia; examples of the latter include Medieval Europe and Japan in the Edo Period. There is no form of judicial system in a bureaucracy. In Medieval Europe, the most distinguishing feature of the western legal tradition was that all kinds of judiciary power and all kinds of legal systems that competed as rivals.[84] In a feudal society, although there is a hierarchy, it is doubted that the hierarchy is stable. It was mentioned by Max Weber that management in a traditional society lacked a clearly defined 'power' or a fixed and rational hierarchy.[85] Thus, a reasonable judicial system from the central to local levels is generally non-existent in a traditional society. The practice of having temporary agencies dealing with judicial issues, or rulers interfering with judicial issues momentarily, resulted in a judicial system that lacked stability.

iv. The degree of separation of officials. A major distinguishing feature of the modern judicial system is the separation of judicial staff from other governmental agencies. This means that staff in the judicial department may not be able to be involved in other state roles. Modern politics and the judiciary cannot be distinguished from the traditional if the duties of the judicial staff overlap with other offices. Therefore, judges as a general rule only exercise judicial functions and do not take on any other responsibilities. This is not the case in traditional societies such as feudal Germany where the judges had several duties. There was also a form of Cabinet Jurisdiction[86] where the King exercises his power in the judiciary directly. Additionally, in the local branches of government, officials from the military department and executive officers oversee the judiciary.

It is important to note that complete separation of judicial personnel from other functions is not always the case even in developed constitutional systems. Firstly, in some instances judges have dual titles. In the United Kingdom, the Appellate Committee of the House of Lords acts as the final court of appeal. Members of the committee are professional judges as well as members of the House of Lords. However, there are other members of the House of Lords that are qualified to handle cases but never actually do. Generally, judges do not act in another role in the modern legal systems, neither do they have much influence in politics. Secondly, the independence of officials does not exclude completely the participation of the general public in the judicial process. One of the features of modernisation is the popularisation of the public's involvement in politics and social

[84] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).
[85] Max Weber, *Economy and Society* (1978).
[86] Ibid.

affairs. In the judicial arena, this means allowing laymen to participate in trials as jurors and assessors and having laymen in certain judicial tribunals dealing with misdemeanor cases. Also, there are some magistrates in the United States and the United Kingdom that may hear cases, but they are professionals in other areas. The jury system in the common law system is another example. Examining the history of the legal system may shed more light on this topic.

The traditional judicial system can be seen in the societies of 'primitive man', ancient Athens and medieval Europe. A common law has existed and been exercised since the time of primitive man, or early human society. These laws were enforced and protected by a particular authority. The courts was not separated from other governmental branches, rather they were mixed and governed by an authorised party occasionally or frequently.[87] Athens is generally recognised as a well-developed, classical democratic state, and Engels referred to it as an ancient, highly-developed government.[88] Despite it being a traditional society, Athens' governmental structure was sophisticated, the branches of the government were well-organised and there was the dispute solving organisation - a court with a jury. In Periclean Athens, the Areopagus and the assembly of all citizens met elsewhere in Athens, but some public meetings, such as those to discuss ostracism, were held in the agora. Beginning in the period of the radical democracy (after 509 BC), the Boule, or city council met with the Prytaneis, presidents of the council, and the Archons, or magistrates, in the agora. The law courts were located there, and any citizen who happened to be in the agora when a case was being heard could be forced to serve as a juror. The agora was open to all citizens and was both a legislature and a supreme court. It saw all cases except those of murder and religious matters, which became the only remaining focus of the Areopagus. As George H. Sabine said, courts in Athens were similar to others giving verdicts on civil and criminal cases, however this was not their only power, they had more control in the executive and legislative areas than those in a modern system.[89] In fact, certain courts might have had equal status with the agora.

The judicial system in medieval Europe was still essentially the traditional form. During this period of time, there were Canon courts, feudal courts, farm courts, commercial courts and royal courts. Each court exercised their judicial duties among their other powers. For example, the common farm courts were held by the owner or its representative, and they not only heard civil and criminal matters, but also legislated on such matters as the use of public fields and farms and the harvest of crops and other plants. Additionally, judges in the common law system were required to handle the

[87] E. A. Hoebel, *Law of Primitive Man: A Study in Comparative Legal Dynamics* (1987).
[88] The Translation and Edit Bureau of the Contral Comittee of the CCP: Marx & Engels, *Selection of Marx and Engels* (1975) vol 4, 115.
[89] George H. Sabine, *Two Democratic Traditions* (1993).

general legal duties for the Crown as well as some administrative affairs. On the other hand, the equity courts acted as the chief executive office for the King, the prime minister and the revenue department.

Just as the modern judicial system differs from the traditional in many ways, so do modern court systems within different countries have their own features. Generally speaking, there are two basic models: America and Germany are examples of one and the other can be represented by France.

The modern judicial system was established gradually in France since 1879. France is the homeland of Montesquieu, however his theory of the separation of powers was inspired by his observations of the English Constitution and not the French. n. France opted for a more thoroughgoing separation theory. In the Constitution of 1791, the judiciary was given equal but different powers from the legislative and the executive. On one hand, it forbade Parliament and the National Congress from exercising any judicial power and on the other hand, it denied the necessity of judicial review of legislative and executive action and forbade the courts from intervening in the exercise of legislative powers and law enforcement. Therefore, judges could not control the legislative or the executive. More than 200 years later, this mode of separation of powers remains entrenched despite revolutions and civil wars. The chief feature of the modern judicial system in France remains that adjudication is the main duty of the courts and the courts are the centres of dispute resolution.[90]

In contrast to France, the United States of America has a different system. The entire political system, including the judicial system, uses the theory of the separation of powers as its basis, where each branch of the government can limit the power of the other two branches. In other words, the legislative, the executive and the judiciary not only act on their own duties, but also exercise other powers to some extent. For instance, the power to resolve disputes may be exercised by the executive in certain cases, but generally the separated branches exercise their own main roles. In order to maintain the balance of powers and to limit the powers of the legislative and the executive, a judicial review was set up through the landmark case of *Marbury v. Madison* at the very beginning of the United States of America.[91] This case is the basis for the exercise of judicial review of legislation by the U.S. Supreme Court as a constitutional power. The Court ruled that it had the power to declare void a statute which it considered repugnant to the Constitution. It legally established the right of the judiciary, and in particular, the Supreme Court, to overrule the actions of

[90] The formation and development of the administrative court system in France indicates that the extreme separation of functions has changed to some extent. However, whether the existence of the Committee of Constitution indicates the coming of review on violations of the constitutional is still a question. This will be discussed further in the Function of Courts section.
[91] *Marbury v. Madison*, 5 U.S 137, 2 L. Ed. 60 (1803)

coequal branches of government and thus laid the basis for the current power of the Supreme Court. The French legal system had a significant influence on the German system. In both countries, the judiciary, the legislative and the executive are separated and the judiciary is unable to limit the power of the other two branches. Furthermore, the judiciary may not hear administrative cases which in the case of France are heard by the Conseil d'Etat. However, there are some important differences between these two countries. In particular, after World War II, Germany was influenced by the common law system and thus set up the Federal Constitutional Court with power of judicial review of legislation. Documents show that from 1951, its first year in operation, until June 1978, the court had handled 41127 cases, including 1207 unfinished cases, thus indicating its active part in the political system. . As a result, the judicial system in Germany is similar to the separation of powers in the United States.

B Judicial Independence

1. Rationale of judiciary independence

Gabriel Almond believes that the level of independence of the branches of government is one of the three main criteria of modernisation.[92] Huntington also holds that the separation of political functions and autonomy is an important feature of the modernisation of politics.[93] Similarly, as branches of the political system, the degree of legal and judicial modernisation may be measured by the extent to which the branches of government (particularly the judicial branch) are independent of each other.

From a philosopher's point of view, independence includes two elements: subjectivity and objectivity. The former refers to the free will of subjects. People can behave and make decisions according to their judgment, hope, faith and reason; their actions are driven from inside and not instructed by others or interfered with by external factors. In this regard, the theory of independence is similar to the theory that individuals have free will. Additionally, the theory of independence can be regarded as a reflection of liberal thoughts in the judicial area. The objective element refers to individuals having the freedom to act without any instruction or interference, thus forbidding any kind of external obstruction. This element is similar to the modern freedom mentioned by Benjamin Constant and the concept of freedom as referred to by Berlin.[94]

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[92] Gabriel A. Almond and G. Bingham Powell, Tr. *Comparative Politics, System, Process, and Policy* (1978).
[93] Samuel P. Huntington, *Political Order in Changing Societies* (1968) Chapter 1.
[94] Li Qiang, *Liberalism* (1998) 172 – 182.

From the perspective of the sociology of law, judiciary independence is a result of historical progression. It is connected to the trend of the division of social work and the increasing complexity of social life. It is also an imperative the role of law in today's complicated modern society. The reasons are that, firstly, judicial independence is a natural requirement of justice, substantive and procedural justice. Society looks to the legal system as a means of maintaining order and a place to solve their legal problems; however, this system must be seen to display justice for people to choose to use it. This is especially important in cases involving the government as one party, the judge's ability to be unbiased towards the government largely depends on whether the judge is independent or not. If cases are interfered with by governmental powers or a judge is biased towards the government's interest, then the authority of the law and the achievement of a society governed by law would be affected. Simply put, the more independent the judicial system, the more justice it upholds and vice versa. A judge working under governmental pressure is hard to be regarded as unbiased because it is hard to establish just how much influence the judge has, and experience tells us that improper behaviour usually occurs in this type of situation. As a result, injustice is a certain result of judicial non-independence. Therefore, it is important that when the judicial system is first established it is made independent in order to protect the exercise of justice. The Announcement of Principles of Independence of The Judiciary, which was passed on 19th August 1995 in Beijing, states that judicial independence is a crucial element in the fulfilment of judicial justice and public trial.

In these circumstances, judicial independence is a concept beyond time and ideology. In fact, it technically already existed before recent times, and even before the theory of Montesquieu was well-known. As a German judge said when Germany was still a monarchy, the judges have had a very high level of independence.[95]

Another reason behind judicial independence is to prevent the abuse of powers and unpredictability. Judiciary independence can avoid this unpredictability and additionally, prevent governmental interference in the fulfilment of its modern function and limit the powers of the other branches of government. Therefore, this is an issue with political ramifications. Hamilton, in The Federalist Papers, noted that the judiciary is the weakest branch of the three powers; it has little chance of limiting the powers of the other branches unless it protects itself from their interference. He also mentioned that independence was the key to limiting powers to prevent one branch going beyond their powers and thereby jeopardising human rights.[96] As human history has experienced, a legal

[95] Song Bing edited, *Procedure, Justice and Modernization – Foreign Legal Scholars Speeches in China* (1998) 31.
[96] Alexander Hamilton, John Jay & James Madison, *The Federalist, A Commentary on the Constitution of the United States* (1980).

system that is not independent can lead to a lack of natural justice as well as government interference, violence and corruption. If law cannot provide reasonable social anticipation of judicial outcomes meaning that decisions are unpredictable, like cases are not treated alike and there is bias, then individual freedom is unprotected.

Finally, judicial independence is important in the maintenance of the legitimacy of judicial powers and a means of gaining public confidence. If the courts can convince themselves and the public that verdicts have not been affected by any social connections, then the public's issue with the court's legitimacy might no longer exist and the court system can be recognised as legitimate. Self-governing, judicial independence must be in place to maintain the power and moral authority of the judiciary.

Therefore, it is easy to see why the Chief Justice of Canada's Supreme Court praised judicial independence so highly: it is precious because it meets the demands of social needs. Judicial independence maintains the public's confidence in an unbiased judiciary system, because the court system will not work without trust. Independence also ensures a government that is ruled by the law; the constitution is regarded as the root of the whole society, for example those people exercising power must adhere to the law.[97]

2. Models of judicial independence: comparing the traditional with the modern

The greatest distinction between the traditional judicial system and the modern is their levels of independence. Although an absolute division is an ideal, we can still divide the judicial systems into two types both in theory and in practice. The modern system is highly independent while the traditional system has little or no independence. This difference can be seen in many aspects of the judicial system.

a. The independence of the trial procedure.

This refers to whether a judge would be interfered with by any external pressures when hearing a case or exercising judicial power. In the modern judiciary, any outside interference is unacceptable. By contrast, the traditional judiciary allows certain interruptions, both formally and informally.

More specifically, in the traditional judiciary, some governmental agencies outside the judiciary are

[97] Yang Zhenhan, *Judicial independence in Hongkong* (1999) 48.

authorised to enter into legal actions both in theory and in practice. In this case, the judges cannot ignore their opinions. To some extent, these authorities actually control the government and society. They master the ruling resources of the society, nation or special region and they then have the power to exercise their authority on every aspect of the region. Usually they are governmental agencies, particularly the sovereign, but occasionally they may be a commander in chief or a party in power. All of these parties may interfere in the legal procedure either by making laws and policies or by interfering in a particular case. An example of the former can be seen in Japan during the World War II. The 40th Prime Minister of Japan, Tojo Hideki, states in National Joint Conference of Judges on 28th February 1944 that when you exercise your judiciary power, you should only hold the faith to the victory of Battle Royale and get rid of all your personal thoughts… if you don't update your thoughts in order to cope with our national strategy, I have to enforce some certain measures intentionally.[98] An example of the latter is the famous 'mill event' in German history. In this case, King Friedrich ordered the removal of a verdict and the arrest of the judge because he believed the judge to have been biased for the plaintiff. The interference here is a direct order, although sometimes it might also be tactful 'instruction'. Interference might come before, after or even during the trial or may come indirectly, but no matter how or when the interference is made the judge has no choice but to obey and implement as instructed in order to avoid punishment.

There are sometimes cases in the modern judicial system where the judicial system's independence is interfered with. Governmental powers are relatively separated and exercised by different agencies. However, there are still some examples of interference both latent and obvious in informal circumstances. An example of an obvious interference is the long-term 'pre-reading' policy in China, where a verdict must be passed by the Chief Judges before announcement. In this case, the Chief Judges of sections and of the whole court give their opinions on the verdict and the trial judge is bound by these opinions. Latent interference occurs when, despite the announcement of independence by the theory and the law, a level of interference is tacitly agreed or permitted in practice. This is not only an issue of subconsciousness or latent dependence, but also an issue of practical purpose. Japan's controversial Naganuma Nike Missile site case in 1969, concerning land acquisition for defence purposes, is a good example of latent interference. In this case, the Chief Judge of the local court wrote a letter explaining his viewpoint to the case to presiding judge Fukushima. Under the interference of the Chief Judge, Judge Fukushima makes the letter known to the public and seeks the protection of judicial independence. In a sign of what was to come, Judge Fukushima granted an injunction against the construction of the base, a decision that was immediately appealed to the Sapporo High Court and reversed. Finally Judge Fukushima, instead of

[98] Chen Ronghe, *Going through Japanese judicial Reform to Talk About Current Our National Judicial Reform* (1989).

the Chief Judge, was the one to face disciplinary action. This indicates that although 'judicial independence' is an article of the constitution, its practice is still limited because of latent or informal institutional influences. In contrast in the modern society, a relatively high degree of independence may be seen in some aspects.

Independence in the judicial systems requires that a trial is conducted by the judge free of interference from any other judges, governmental agencies, individuals or organisations. In this case organisations might be the legislative, the executive or the military, parties, other political organisations, specialised interest groups, the public or a celebrity. Christopher M Larlrins points out that there are three aspects of judicial independence in the modern society. First is justice. This means judges can only make a decision based on the law and facts, instead of personal bias. Second is keeping away from politics or self-government; judges should not be regarded as a tool for fulfilling political purposes. They are not liable to be punished for making popular decisions. We cannot change the formation of a court for political reasons. Third is judicial power. Courts have powers to limit powers of other branches of government, to maintain justice, to enforce and fulfil the value of the constitution and law, which are independent of the interest of politicians and public opinion.[99] Other judges may refer to colleagues not involved in the case, more superior judges, including the chief judge and the court elders and there might also be other courts, from a lower level, the same level or, as is usually the case, a higher level. Generally, we can divide the above 'parties' into either internal interference, for example the judges and courts, and external interferences, those listed above that remain.

Additionally, there are certain behaviours that are common interferences in the judiciary, and it is important that these are excluded and forbidden. We can divide these behaviours into four categories. Firstly, there are enforced orders and non-enforced enquiries, including demands for certain actions that must be exercised, or are 'suggested'. Secondly, there are direct or indirect orders, where courts might be given an opinion through obvious letters or oral methods, or judges may also be interrupted with suggestions or hints. Thirdly, there are macroscopic or microscopic methods. The former would be influencing trial by making strategy and the latter focuses on the individual case. Finally, there is inducement which occurs when judges are offered bribes.

The judge who exercises judicial power must act according to conscience. In Hong Kong, Judges and Judicial Officers are required under the law to take the following judicial oath on their appointment: '… in full accordance with the law, honestly and with integrity, safeguard the law and

[99] *Legal Review of Zhongsun University* (1988) vol 1, 282 – 284.

administer justice without fear or favour, self-interest or deceit'.[100] This indicates that conscious independence occurs when each judge adjudicates according to the law and conscience without any interference. On another level, the legal organisations must have independence. If the judges of a court are independent, then the court must be independent too. However, an independent court does not necessarily have impartial judges, because of the administrative feature of its internal operation. The main purpose of advocating judiciary independence is to exercise judicial powers appropriately. However, this could not exclude the relative expression of parties involved, nor does it exclude the exercising of legal rights by relevant parties. This is supported by the 'Friend of Court' in America and public support in cases related to public interest or political purposes such as the Azuma Shiro case. Additionally, the public and media have the right to criticise and sometimes this criticism can be extremely acute. It is well accepted that following the trial, open and reasonable criticism would not harm the independence and is quite common in the modern society.

b. Different protections of judicial independence.

Maintaining judicial independence during the procedure is not enough; judges are human beings with needs. If they are afraid of losing their position or worry about their living expenses, then they are no longer independent. Furthermore, they might have to think about their future after handling the individual case. A former judge of the Supreme Court of Germany indicated that the independence of this occupation does not exist if the judges have no personal independence.[101] Even if the premise exists or the judges are asked to be impartial, a long-term system needs to be in place to protect judicial independence. In this regard, the modern judicial system may be held as the model.

i. Establishment of formal requirements o confirm the independence of the judiciary, meaning that the courts must be treated as independent organs on judicial issues and cannot be interfered with.

Firstly, the court is the only authority that can deal with legal issues. Any dispute that relates to the law should be handled directly by the court. Exemptions can only be made with the court's permission and thus other governmental agencies, especially the legislative and the executive, cannot forestall legal disputes. Therefore, there should be strict limitations on the establishment of temporary courts, including military courts, to exercise judicial powers. (Military courts may dispense military justice over personnel of the armed forced charged with military offences.) This

[100] Hongkongness Association, *Hong Kong Law* (1987).
[101] Song Bing edited, *Procedure, Justice and Modernization – Foreign Legal Scholars' Speeches in China* (1998) 32.

helps to avoid the situation where the government can overrule the standing courts' judicial powers in order to interfere in the legal procedure. Additionally, those limitations should be in place to prevent the government establishing other organisations to replace the courts. It is important, therefore, that courts have the right to vote or at least to participate in the discussion on its construction; this involves whether or not to establish a court, how it should be set up and whether to cease an internal section. Courts such as the Supreme Court have the right to participate in the discussion; the executive cannot order any closure or cease of a court, nor does the legislative have the power to establish or abolish a court at any level.

Secondly, courts should have the power to make their own decisions and have access to sufficient legal resources. Courts should have the right to decide their own budget or at least discuss it with the relevant organisations. The budget should be adequate to the running of legal functions and to maintaining the dignity of legal activities. Without this, the courts may not be able to deal with large caseloads efficiently. Additionally, it is not right that a judge should have to bow to certain individuals or the legislative and executive to gain more resources for their own survival and the running of the court. In a modern court system, legal resources are provided by the government and therefore expensive legal costs are a rarity and parties are often charged a nominal or even no fee.[102]

ii. Regulations on the appointment of judges.

Judges must be paid a sufficient salary. Public servants, including judges, work better when they are properly paid and they are also less likely to be tempted by external forces and corruption. Next to permanency in the office nothing can contribute more to the independence of judges than a fixed provision for their support; power over a man's subsistence amounts to power over his will.[103] It is necessary, therefore, to provide a relatively higher salary for judges if the society is capable of doing so. The amount of the salary should be fixed and adjusted according to inflation and should include a reasonable superannuation deal. Naturally however, the independence of a judge should not rely too heavily on the salary, as resources are limited and the nature of humans is to pursue our own interests. As a former German judge observed, the hungry man cannot work well because he is starving and the man who is full cannot work well because he tends to be lazy after eating too much; the best public servant is one who is neither starving nor full. According to this theory, paying the

[102] In America, if someone wants to bring a civil action, no matter what amount the claim is, the party only has to hand in UD$120 for filing fees. To people who cannot afford this, courts may even waive it. There are also systems such as legal aid, where the government pays the fee.
[103] Alexander Hamilton, John Jay & James Madison, *The Federalist, A Commentary on the Constitution of the United States* (1980).

judges a medium level salary is the best solution.[104]

Most countries pay their judges a higher salary compared with other public servants except in Japan, Singapore, America and Hong Kong. In the United States of America, for example, the salary of a judge in the Federal Court was far below the President's salary (US$ 200,000) and even lower than the Members of Congress (US$ 133,600) until 1991. In 1996, the annual income of judges in the Federal Court was between $133,600 (in local courts) to $171,500 (in the Courts of Appeal) and the difference between the Chief Justice and other Justices was just $ 7,400.[105]

In addition to suitable material rewards, it is important that the job of a judge is for a fixed term in office or life tenure. If a judge cannot be sure about the future of his position, his performance and his judgements may suffer. Therefore, there should be legislation appointing a certain number of years in office or life tenure to judges to prevent worries of instability. This method is well accepted in many counties, for example, in Germany judges retire when they are 65 years old and 70 - 72 in Australia. In some American states, the period of a judge's position is 7-10 years. It is important that while that fixed term is in place a judge cannot be removed unless he commits a crime or events occur that prevent the judge from performing their duties.

Clear guidelines must be outlined for the reasonable procedure of impeachment and punishment for a judge. Judges cannot be punished without trial and, if impeached, they must have sufficient rights to defend themselves. A judge is only human, and so it is unreasonable to assume they won't make mistakes; the process of dealing with these mistakes is crucial. In order to maintain judicial independence, the best solution may be to establish a just process, which should provide sufficient defending rights. There should be the establishment of specialist organisations such as the Discipline Court in Germany and other judges should be included in the investigation, to avoid the unprofessional opinions dominating the process. The standard for impeachment should be above a medium level so that judges feel they can use their powers freely without the fear of making a small mistake. The grounds of impeachment should be limited to proved misbehaviour or incapacity. Naturally, the punishment should also depend on the qualifications of the judge and the social opinions on judicial independence. In reality, there are few impeachments in countries such as Germany, America and Japan. In American history, there have only been 16 judges (including 11 Justices in the Federal Court) to face impeachment and only 7 of them were convicted.[106] Similarly, Germany's Discipline Court does not have much opportunity to act, nor do they accept many

[104] Song Bing edited, *Procedure, Justice and Modernization – Foreign Legal Scholars' Speeches in Chin* (1998) 32.
[105] Song Bing edited, *Reading: Judicial Systems and Judicial Procedure in America, Japan and Germany* (1998).
[106] Song Bing edited, *Reading: Judicial Systems and Judicial Procedure in America, Japan and Germany* (1998).

complaints.[107]

The performance of a judge should be the main criteria for appointment and promotion. This is not only a requirement of judicial independence, but also an important aspect of the specialisation of the modern legal system, discussed later. Generally, people without qualifications should not be appointed as judges or act as senior judges for they might be more easily affected by external influences.

Another important factor in judicial independence is that any change within the court system should have the approval of the judges themselves. Sometimes, judges may be removed by a superior group or organisation to meet certain requirements or to avoid a verdict that goes against the interest of certain that group.

It is imperative that the government can ensure the safety of judges and their family. Generally, a trial occurs only when an agreement cannot be reached. The decision in a case that goes to trial is likely to be sensitive and the verdict will likely lead to restructuring rights and re-dividing interests. Both parties involved in the trial may then resort to certain methods to persuade the judge to decide in their favour. In this circumstance, it is important that there are measures in place for the protection of the judge and their family, so that they feel they can make a decision without hesitation. During the 1980s and 1990s in Italy, the Mafia often attacked judges involved in trials against Mafiosi, thus illustrating the possible danger a judge faces.

In contrast, the traditional judicial system has no level of independence. As a consequence, it does not have any measures to maintain consistency. This is evident in the provision of legal resources, the appointment of judges, judges' tenure and punishment. In a traditional judicial model, the division of legal resources, at least in theory, is one of sovereign's duties. However, in reality, the courts have to run a budget as well as pay the salaries of the judges. Therefore, the only way for the courts to make money is to charge a lot of money for parties entering into law suits. It is quite common under the traditional judicial system that fees paid by the people go to court costs and salaries. Max Weber observed, in his book *Economy and Society*, that under the patriarchy and hereditary aristocracy, the hereditary aristocracy regarded their titles as achievements of their own, including the allowance and salary that came from the fees collected from the public. Such obvious interest has resulted in fights between courts in British history such as conflicts between the secular courts and the ecclesiastical courts as well as the main three (the Court of Exchequer, the Appellate

[107] Song Bing edited, *Procedure, Justice and Modernization – Foreign Legal Scholars' Speeches in China* (1998) 32.

Court and Curia Regis). Compromise on fees is crucial to the range of charge, and therefore courts introduce all sorts of methods including lower prices to attract potential clients.[108] This occurs in France as well. As a result the selling of judicial positions has a close relationship with the fees, meaning that judicial independence is hard to maintain because of the strong economic element.

3. Judicial independence and restriction

Posner commented that if judicial independence occurs when judges make decisions based only on their own opinion without any pressure from other officials, this independent group would not necessarily have the people's best interests at heart and would become tyrants themselves. He also makes the point that once the judges gain independence and do not face interference from the sovereign, whose or what instruction should they follow? Should they act like politicians with no political restrictions, or under certain regulations of professional instruction? Are there any objective regulations (either statute or common law) or rationales to ensure the objectiveness of the legal system? If the answer is no, judges may their decisions by subjective fiat. This fiat would be effective only because of the amazing magic of the trial stage – higher seats, the gown, the oath and eloquent debates.[109]

I believe that the above questions could be answered positively under the modern judicial system. An efficient system that limits the powers of the judiciary in order to avoid the judicial tyrant must be introduced, while maintaining an emphasis on the importance of judicial independence. Unlike philosophic independence, which is an ideal concept, the ideal judicial independence could not survive in reality; just as liberty, it must be defined to prevent abuse. The main purpose of protecting judicial independence is to avoid the abuse of powers. However, the judicial power itself needs that restriction as well. Specifically, these restrictions may be established in the following three ways. Firstly, the standards of judges' conduct must be regulated, meaning that judges can only exercise their powers under regulations and avoid ultra vires. The typical explanation in a modern society is that judges hold trial independently and obey only the law. By setting up a series of clear instructions for legal procedure, judges would have a clear idea on the correct way to behave as well as the kinds of behaviour that lead to the abuse of powers. Secondly, a code of ethics should be introduced. By training in ethics, judges would understand that an integral part of his or her job is to ignore any personal interests and biases they might have, and decide cases impartially on its merits. If a judge felt that he could hear a case without bias he would be able to excuse

[108] Max Weber, *Economy and Society* (1978).
[109] Richard A. Posner, *The Problems of Jurisprudence* (1990).

himself. This may help in raising the internal fortitude to act for the interest of justice rather than for personal interests. Thirdly, the court's powers and duty range should be limited. The courts should not be able to interfere with issues unrelated to the legal arena. Courts act only when people bring actions, or only when judges are hearing trials; they have no rights or powers in investigations or arrests. Meanwhile there should be some sort of supervision for the exercise of judicial powers; many countries have systems to control the appointment and impeachment of judges. Additionally, the public and the media pay strict attention to the exercise to avoid any abuse of judicial power.

There is a very tense relationship between the media and the judiciary, which is a dilemma facing the legal revolution in many countries including China. In theory, the supervision from the media might very possibly incur conflicts between judicial independence and freedom of speech, both of which are basic principles in constitutional theory. The two groups have very little in common. The media is open and transparent, while the judiciary has its own independent and self-disciplined 'space'. Allowing the media to 'air' and comment on an undecided case would make it very difficult for judges to remain impartial. To meet with the public's approval, a judge may feel he has to make the 'trial under media' or give an 'emotional verdict'. This directly contradicts the Agreement on Human Rights in Criminal Procedures passed at the 15th Conference of the International Association of Penal Law in 1994, which declared in the 15th article that any report from the media concerning a case should have no effect on the verdict. As Lord Denning observed, the freedom of the media to report is a right protected by the Constitution – journalists are free to espouse their opinion on high profile issues. However, this right must be limited under legislation to exclude slander and scorn. The media should not release any ideas that could possibly affect the justice of trial.[110]

The media and the judiciary have very different interests. Essentially, the media represents the 'reasonable person' pursuing the best outcome (economically or politically). The absolute objective to be both neutral and aloof is merely an ideal image. Therefore, it is possible that the media would fight the judiciary for social resources and dominance in society. To some extent the media tries to dialogue with the judiciary, which has a higher status in the social structure, so that the media may upgrade its status and enlarge its authority and fame.

Finally, the logic behind the running of these two groups is different. In the legal system, everything must follow the law, the precedents and the objective fact. Judges make decisions according to legislation and evidence, and try to avoid being affected by personal favours and public emotions.

[110] Alfred T. Denning, *The Due Process of Law* (1980).

The judiciary emphasises justice as defined by the law. In contrast, the media acts on morality. Journalists report issues that grab the public's attention and do not censor their opinions for politicians. They also emphasise justice as it ought to be.

Therefore, it is easy to understand that there are conflicts between judicial independence and the media. The former protects justice through trial while the latter protects freedom of speech. It is impossible to decide if either group is 'good' or 'bad' because both are valuable to society. More importantly, they both have the same inherent goal: to protect the people. The media has the right and duty to collect information and report it to the public. However, this kind of freedom should not affect judicial independence or legal principles. There should be legal constraints preventing the discussion of certain issues by the media. By showing respect to judicial independence, the media would be repaid by equal respect from the law. In practice, legislation on journalism should be introduced to regulate the range and forms in which the media can act, in order to coordinate freedom of speech with judicial independence. Because judicial power has inborn weaknesses but also the important responsibility to society, a system should be established to empower the courts to resolve disputes between the media and the judiciary.

C. Basis for the Judgment

Every judicial system faces the same problem when handling disputes: whether or not to have a certain standard on which to base decisions, and what that standard should be. Because legal actions have so much to do with multiple parties' interests, judges' decisions are the support of one party's claim and the redistribution of benefits. Therefore, the reason behind a verdict is a major focus and is a crucial element in the improvement of justice and the achievement of public recognition. Hence, every society should devote a significant effort to establishing a set of standards for legal decisions to build up the legality of the court system. In a modern society, the judicial system and its technologies are based on dominant secularism and an impersonal legal system. That is, they are independent and not attached to any economy, political party or religion, which is not the case in a traditional society.

1. Different kinds of judgment standards

In the traditional society, the government and other authorities have diverse standards for resolving disputes.

a. The supernatural. Some courts in the traditional societies use supernatural elements to judge right or wrong and true or false in the process of solving disputes. They determine a suspect's guilt and whether he or she deserves a penalty by supernatural standards rather than the standards of a reasonable person. Weber points out that this kind of trial is not solved by a reasonable point of view and it, therefore, falls into the irrational judicial category.[111] This supernatural form of trial was popular in the beginning of the traditional society.[112]

b. Dictator model. In this model, judges hear the trial and make decisions based only on their own personal opinion; there is no objective rule or constraints on their behaviour and the judges have a wide range of powers and freedom. Verdicts from this system are based on a judge's working experience and understanding of social rules and customs with no neutral rules or standards to follow. Therefore, the results are often personalised in accordance with a judge's preference and bias. This often led to different verdicts in similar cases or an overruled verdict based purely on a judge's own views. Although the dictator model is not the most popular system in traditional society, it is quite common. Weber observed that in a traditional society ruled by a 'wise' person, taking a judge's personal view as a verdict is not surprising. In the traditional societies, there are some kingdoms where the sovereign's powers are limited and others where it is not. In the latter, the sovereign is free to do as they please according to their own personal judgment. Weber indicated that the legal system in German history ceased to work when ruled by a sovereign.[113] Montesquieu also noted that in a tyrannical nation there is no such thing as law; judges themselves are the 'law'.[114] Therefore, the traditional society is ruled by judicial officials, particularly those who have absolute power, both directly and when they are participating in legal actions.

c. Religious taboos. Some societies use religious beliefs and taboos to regulate people's behaviour. In most traditional societies, religion is a very common and important subject; China is an exception to this. In Muslim, Christian and Hindu countries, religion has a huge influence on the social life and public organisations. Maine, in his *Ancient Law*, wrote that all traces of statute law in the Orient and Occident, no matter how distinct they are, are all mixed with orders from religion and ethics which are in accordance with ancient theology. This suggestion applies not only to primitive human society, but also for medieval and more recent times. For example, Islamic law was made at the same time as the formation of the religion itself. It is only a part of the religion and has no independence. The Koran is the masterpiece of the Islamic religion and is also recognised as the

[111] Max Weber, *Economy and Society* (1978).
[112] E. A. Hoebel, *Law of Primitive Man: A Study in Comparative Legal Dynamics* (1987).
[113] Max Weber, *Economy and Society* (1978).
[114] Baron de Montesquieu, *The Spirit of Law* (2002).

root of the law, and thus the legislative and judiciary are heavily influenced by religious beliefs.[115] Similarly, in traditional India, the Law of Hinduism is regarded as the earliest legal system; some articles have been found in the classical Veda which was formed 2000 years Before Christ. Even after such a long time the law of Hinduism maintained a strong influence on the legislative and judiciary even during the British colonial period. Local experts on sat in on civil trials to give advice to British judges.[116] Religion also has a strong influence on European legal systems. Christianity has impacted greatly on the legal traditions of western countries. Many legal principles are related to the development of Christianity and some are even drawn directly from the principles or the taboos of the Bible, such as the ideas that legal revolution should improve human morality, , that law should be in accordance with the moral system, and that freedom of contracting, property rights, freedom of conscience and the limitation of power are sacred and inviolable principles. At the beginning of the Canon there is a certain kind of legal order coming into being. Between the years 1050 and 1200, the Canon Law was invented and became a system derived from the doctrine of Christianity. This law governed institutions such as marriage, succession, property, contact and legal procedure, to name a few.

Therefore, religious beliefs and taboos are an important part of the nation and have a strong influence on social life. Societies may use the Koran to explain verdicts, or they may use it to establish the court system and legal principles, as European countries did in medieval times. It is fair to say that no matter what the outcome (compared with a modern society) religion plays an integral part. The relationship between religion and the law needs more discussion; however it could be not discussed in this thesis.

d. Ethics. As a standard of value for regulating relationships between people, morality has its place in the development of human society. Although there are many differences between morality and the law, the law is external and morality internal, they still have something in common. In history every legal system has been impacted in some way by the ethics of certain groups in society. In the traditional society, this standard has been regarded as the basis of a verdict under certain circumstances, which can be done by citing the standard directly to the decision or inventing the legal system with that idea. Around the world, it is more common to see ethics used as the basis for verdicts in countries with strong religious elements, for instance many disputes are resolved using morals in Japanese history.

[115] Gao Hongjun, *Islamic Law: Tradition and Modernization* (1996) 98 – 101.
[116] K.Zweigert & H.Kotz, *An Introduction to Comparative Law* (1998).

e. Customs. Customs refer to a series of standards that relate to people's interests and are well recognised and accepted by the community. Customs are a common basis for solving disputes and are even a way of maintaining social order in a traditional society. However, customs are distinct from the law; the law tends to be more specific in its regulations. Laws are made and announced by the legislative (or the judiciary in common law systems) and enforced with the government's power to ensure they are being followed by the entire nation. In contrast, customs are usually standards within a community to handle personal relationships; they are not strictly enforced, nor are they decided by the legislative. According to Weber, customs have no back up for infringements, however violations may incur boycott from society. Therefore, when the legal system is not good enough to handle disputes, customs can be used for that purpose. Unger's theory proposed that customary law becomes an independent legal model equal to the bureaucratic law and proceedings; even in a society dominated by statute law, the customary has its place. Britain is an example of this. In 1066, when William I became king customary laws were considered when the courts dealt with disputes, and many years later those customary rules became common law.

f. Legislation. This refers to statutes made and announced by the legislative department of government. It can also be called bureaucratic law or regulation. Its characteristics are practicability and 'state ownership'. The former means the statute is stated in direct and clear language and expressed logically making it more easily understood by those to whom the statute is addressed. The latter means the statute is made by the state and is formally announced through a public gazette, so that the statute is known and put into practice. The use of statutes to make law is a result of progress and the development of a traditional society. The premise is, as mentioned above, the separation of the government and society. It is impossible to generate a statute made by the government in the society where the government and society have not been separated. Only when the two are separated, can a legal system be formed. However, the government or nation in this context is not quite a modern democratic country. Montesquieu observed that in autocracy there are stable regulations; hence there is no protection of the law other than religion and customs. He indicates that law can only exist in a monarchy or a republic. Furthermore, the closer the political system is to a republic, the more specific the trial format would be.[117]

In contrast to a traditional society, scope for arbitrary verdicts is limited in a modern judicial system. In other words, legislation is the essential basis for adjudication. Trial under law is a basic characteristic of the modern judicial system. The standards for verdicts used in traditional society, and discussed above, no longer exist. The absolute format for this system, as Max Weber mentioned,

[117] Baron de Montesquieu, *The Spirit of Law* (2002).

is the trial, which reaches the peak of logic, reasonableness and methodology (reasonableness in format). Its characteristics are: 1) the specific legal system applies abstractive articles to matters of fact; 2) these matters must be treated with legal logic and decisions should be made according to the applied abstractive legislation; 3) the current legal system should be practical and objective and have a 'perfect' structure, or it should include a kind of system or be regarded as a system designed for application; 4) the common behaviour of human beings must be interpreted by the applied or practical legal principles, or be interpreted under the 'violation' principles.[118]

The descriptions made by Weber contain certain elements beyond reality, however it compelling portrayal of a modern judiciary. Friedman noted that Weber's observations represent the legal inference that appeared in Europe in the 19th Century, and can also be found in countries like Japan and Turkey which absorbed the French and German legal systems.[119]

Naturally, the modern 'trial by law' system has diverse formats and Weber's model is only the most typical. Another form is the 'stare decisis' found in common law countries. Contrasting from civil law countries, in the common law system the 'legal rule' has been developed from the reasons behind verdicts. Generally common law has two levels of meaning. Common law develops gradually from precedents. The construction of legal concepts in common law is like the growing of coral, there is a kind of sedimentation and development of the body of case law over several centuries. The power of legal rationality comes from the accumulation of the wisdom of judges instead of any structure of a system. That is, through the collection of wisdom from thousands of precedents inside the 'coral kingdom'.[120]

On the other hand, precedents can be revised or abandoned under certain circumstances. Such circumstances might occur when a certain precedent is regarded as out-of-date, or it was made by a judge without the authority of law. Therefore, precedents need to adapt to modern conditions in order for them to achieve the relative justice or the balance between different stages. Naturally, to ensure the stability and predictability of the law, judges cannot revise or abandon precedents rashly, certain criteria needs to be examined before making any decision, such as whether the harm of abandoning the precedent is less than the harm of keeping it, even if the precedent is flawed. It is crucial to maintain a balance between the stability and continuance of a legal system and the benefits of revolution or perfecting while dealing with cases relating to precedents.[121]

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[118] Max Weber, *Economy and Society* (1978).
[119] Song Bing edited, *Procedure, Justice and Modernization – Foreign Legal Scholars' Speeches in China* (1998).
[120] Roger Cotterrell, *The Sociology of Law: An Introduction* (1984).
[121] Song Bing edited, *Procedure, Justice and Modernization – Foreign Legal Scholars' Speeches in China* (1998).

It is important to note that although countries with a common law system generally pursue the doctrine of 'stare decisis', this does not mean that there is no statute law in these countries. In fact, the needs of social reality have resulted in an increase in the number of statutes, particularly in the criminal area. For example, the modern principle of 'conviction and punishment must be brought under law' means the judiciary cannot convict anyone by creating a new crime without the affirmation of the legislative. However, basic reality cannot be denied, that even statutes are interpreted in the form of precedents and that in vast areas such as contracts and tort e common law precedents dominate. The role of the statute in common law countries still tends to be a kind of amendment or supplement to the general law. In practice, statute law usually becomes more effective after being interpreted by judges and applied to a certain case. Furthermore, once an article of statute has been cited, it becomes the precedent for later judgements and is bound by the 'stare decisis' and cannot be interpreted freely again.

In contrast, in continental countries, case law has its place while the priority of statute is being pursued. But the 'stare decisis' doctrine is not recognised by traditional opinion or the theory in the continental legal system, where a court is not bound by judgements made by other court in theory.

In practice, the continental courts' attitude towards precedents during trial is similar to the common law system. Nevertheless, the reason why judges in the continental system rarely make any 'extraordinary' decisions like judges do under the common law system is that in those societies judges are operators of the system. They are regarded as the technicians operating the legal machine that has been created by scholars and the legislative; the judges' role is regarded as less important. This results in judges attempting to deny that case law is a kind of legal resource. Precedents in the continental system are not organised, unlike in the common law countries, and case law has not yet been formed as a system.

The establishment of the principle of 'trial by law' is not a coincidence. To a large extent, it developed from changes of opinions on the relationship between social control and the limitation of powers in the modern society. One of the basic claims of modern society is that law should be regarded as a means of maintaining social order, regulating social behaviour, managing national affairs and advocating the 'society ruled by law'. As a result the law affects all aspects of social life. In the last several centuries the world has seen an increase in the law. This increase in legislation has occurred in accordance with changes in society: from the tribe to the modern life, from title to contract, from community to city. Methods of control outside the law have become weaker and even

diminished.[122] It is well accepted that governmental powers should be separated and limited by each other, and therefore trial by law is one of the most important means of limiting powers and avoiding abuse coupled with the executive and legislative. Trial by law is also an effective way to keep the balance among the three branches. Otherwise, as Montesquieu observes, the judiciary and the legislative would become one and judges would become the new lawmakers and the people's lives and liberty would be harmed by arbitrary government.

On the other hand, trial by law is the essential element of judicial independence, as well as the basic means of ensuring the orthodoxy of judiciary activities. Regulations define the range that a legal system can reach. The process of judges hearing the trial and giving a verdict is recognised as an application of the law into reality, and their powers seem limited, therefore legitimacy is easier to prove, and also a threat to decision maker could be mitigated. In addition, the creative activities brought by the judge during a difficult trial could be sheltered. Therefore, trial by law is looked upon as a constraint on judicial powers, when it is in fact a form of protection. It helps judges eliminate interference from governmental agencies or social organisations and also helps eliminate complaints and criticism.

Trial by law also provides people with the knowledge of what the courts will do under the law and how other individuals and governmental agencies would be affected by legal proceedings. People are then aware of what is happening in the legal system and this allows them to anticipate what the consequences of their actions, legal and illegal, will be. As Friedman says, 'we must know what the rules are and whether the ground under my feet would move or not; I must be able to trust in regulations and trust the organisation and proceeding; I must trust in how courts are running, believe in them for their faith and ability.'[123] The statute law model in the continental legal system serves this purpose, as does the 'stare decisis' in common law. Chief Justice Harry T Edwards, U. S. Court of Appeals for District of Columbia Circuit, states that the 'stare decisis' enhances the stability and accordance of judgements and helps people to make plans for the verdicts they receive. On the other hand, this principle advances people's trust in the rule by law because it ensures that the decisions made by judges are not, and should not be recognised as, reflections of personal favours or opinions.[124]

Nevertheless, it is important to note that there are some auxiliary standards, besides the law, used when assessing a dispute. These standards may exist in different countries at different times and

[122] Donald J. Black, *The Behaviours of Law* (1976).
[123] Song Bing edited, *Procedure, Justice and Modernization – Foreign Legal Scholars' Speeches in China* (1998) 118.
[124] Ibid, 245.

although they may not be used frequently, their value cannot be ignored. One of these standards is customs, although this is not practical in the modern society, it still exists in the traditional. For example, in Catalonia of Spain, the statute does not apply to local cases, the customs are applied instead.[125] The other auxiliary standard is doctrine, or the opinion of law scholars. This is used frequently in countries with continental legal system. Doctrine can easily draw attentions and sometimes even incur the change of authorities. Of course there are still some other standards, such as the general principles which mentioned by Hayek in the Constitution of Liberty.

2. Different standards in trials

The legal regulations used in the modern society are quite different from the religious beliefs, customs and the sovereign's will used in traditional societies. There are several distinguishing features of the modern standards of trial.

a. The regulations are more practical. In other words, the regulations are definite rather than ambiguous, and are well-structured, which is quite different from customs. It is true that customs can be accurate, however they are more an implicit understanding without verbal communication and there is no clear-cut rule to go by.[126] To rule on people's behaviour and public opinion there needs to be clear expressions on regulations and they need to be widely known and accepted. The certainty has strong relation to the practicability, as well as the relationship between behaviour and relevant consequence. Only when the law defines these relationships clearly can people plan their work and life according to the law.

b. Regulations are applied to the public area. The regulations should be made by the nation and enforced by governmental powers. They exist under the premise that the government and the community are separate entities and they are, therefore, not generated from the community.

c. Regulations should be applied to general situations. This means that the regulations are not tailored to suit any one particular case but rather they are able to be used in general circumstances. In this way, the law regulates common social relationships instead of specialised ones; there would be strong objections to the legislative making special laws for certain cases.

d. Regulations should be made in advance. Judges can only use laws that are current and have been

[125] Marry Ann Glendon, *Comparative Legal Tradition in a Nutshell* (1982).
[126] Roberto M. Unger, *Law in Modern Society* (1976).

proved effective to solve disputes. Regulations cannot be created during a procedure and 'provisional legislation' is not acceptable. With Hayek's ideas, the modern law, or the regulations under the rule of law, should have 'prospective' efficacy and cannot be used upstream. However, legislation for individual cases, or provisional regulation, is very common in the traditional society. 'Prospective' efficacy cannot be treated absolutely; there are exceptions. Not only judges in the common law countries are allowed to create new case law under the principles of justice, rationality and the theory of law; but also do judges in the continental system to refer to the precedents to some extent.

e. Regulations are self-governing. They are not a repetition of any non-legal belief, or standards of economy, politics or religion.

Overall at the abstractive level, it is reasonable to regard the above elements like the certainty, prospective efficacy and self-government as basic aspects of the difference between modern and traditional legislation.

Regulations and legal rules also have distinctions in the traditional and the modern judicial systems.

Firstly, they have different levels of generality. In the traditional judicial system, the general law can only be applied in a very limited range and is sometimes even excluded. There is sometimes competition between religion and law or conflicts between religion and the government. The sovereign often interferes with the judiciary at their personal will, regardless of whether this will is against the law that he made directly or recognised indirectly. Additionally, judges sometimes use their personal sense to judge despite the law. In contrast with this, laws are applied much more strictly under the modern judicial system.

Secondly, they have different levels of equality. Regulations in a modern society can be used equally by individuals, organisations or government agencies. Every member of society should follow the law and accept equal constraints, while in ancient times, the law was a way of governing people but the sovereign was above this law. Legal activities also differed depending on the parties' status.

Thirdly, the laws are made by different agents. In the traditional society, the laws are usually made by an exclusive authority such as the king or emperor, while in the modern society; the laws are made by an agent representing the will of the entire nation, usually the parliament or judiciary. This

difference is related to the separation of powers under the contemporary concept, which indicates that it is the legislative that should be responsible for making laws. Sometimes the judiciary would share this power as the legislative cannot always keep up to date with the society's needs. As Hayek states, the rationality of human beings is not unlimited and cannot feel and master everything in the world; the process of people getting to know the world is a kind of development step by step. As a result, no legislation can anticipate all social issues. The conflict between the delay and the real needs incurs the need and the possibility of judges' intervention. It includes interpreting general principles into more specific ones or expanding definitions according to an individual situation. On rare occasions judges would even invent new contents. Article 4 of the Civil Law of France (1804) stipulates that a judge would be charged with 'Refusing to Act' if they did not commence a legal procedure with the excuse that there was no regulation or clear rule for that particular case. One of the drafters of this Act, Portalis, thought that the situation would certainly arise where a judge faces a situation not mentioned by the law. In this circumstance the judge should be allowed to supplement the current law according to the spirit of justice, conscience and wisdom.[127] Judges have accumulated their knowledge through long-term practice and they should use this knowledge in the individual case. When a new decision is recognised and cited in a later trial, the precedent system comes into being. Thus, the dispute-solving system of the country is no longer a monopoly of the legislative; it also contains contributions from practitioners. In the United Kingdom and the United States of America, typical common law countries, after the 20th century while statute law is becoming more and more important and case law maintains its status. This is quite different in the traditional society where there is no separation of powers and it is common to see a monopoly of power. Therefore, an independent legislative department cannot exist, and even if there was it would be the sovereign itself. As a result, decisions made according to precedents do not necessarily produce an institutionalised norm of conduct.

Fourth, they are different in structure. If we recognise the legal system in the modern society as a sophisticated and rigid unity, then the traditional would be the opposite in that it is rough and uncertain with less internal consistency.

Fifth, there are differences in discretionary power. Judges in both societies have this kind of power, however they are different. In the modern society, even with rational law-makers, accurate language, perfect logic and an ideal legislative competence, the idea of a perfect law to fit every individual case is unrealistic. Societies are becoming more and more aware that the view of legal activity being simply a connection between law and reality is an unrealistic Utopian myth. As long as law-

[127] Guo Huacheng, *Comparative Study on Legal Interpretation* (1993) 29 – 30.

makers are mere human beings with a limited ability to master every area it is impossible for them to anticipate the future and to make laws to fix situations that they believe may happen. There are four kinds of fantasies or biases deeply embedded in people that prevent them from becoming omnipotent. The first one is race, that is that people regard all personalities as coming from nature and form the subjectivism; the second is 'cave' fantasy, where people make their observations with the limitation of personality, favour, educational background and living environment, meaning they are in a 'cave' and cannot see the whole picture. The third is the fantasy of 'mere puff'. When we watch TV or walk in the market, we see 'big sales' everywhere, where retailers use a mix of words and ambiguous meanings to trap consumers. The fourth is the theatre fantasy, where people become unrealistic and make mistakes because of fetishism.

This idea has been proved in practice. History tells us that the legislative is not able to anticipate what situations judges will face and therefore, the generality might be a co-incidence or made by the legislative to input elasticity into the law and allow it to face a series of complicated and changeable situations. Therefore, the net of legislations might be loose but it contains no leaks. Furthermore, in a modern society, the laws made by parliament are merely a frame or brief indication, and the interpretation of the law becomes the extended part.

Additionally, due to the characteristics of language used to express the content of the law, legislation is doomed to be coarse and ambiguous. As a medium for human thought, language is imperfect. In order to express our thoughts we need to make words and organise sentences and therefore the language we need should be clear, with fertile words and phrases enough to cover our feelings. However, at this point in time there is no language that meets this requirement. As a result, no matter how distinct things are, or how accurate ideas are, they can only be expressed with the limited and ambiguous vocabulary at our disposal.[128]

Another challenge for the law is that public expectation goes far beyond the reality of the techniques for making laws. It is a well-known fact that the process of law making (including revision) is complicated, rigid, and time-consuming; it needs discussion, proof and a degree of stability – the foundation stone of the law. When a piece of legislation can no longer cover social issues, or cannot be applied to new cases because of changes in society, law-makers could not and should not simply change the law to suit the new situation. A better solution would be authorising the judge handling the particular case to interpret the existing laws according to the updated social

[128] A good example in China is that if one person knows the good is counterfeit, but he still buys it for legal accusing purposes, is he still a consumer in accordance with the Law on the Protection of Consumer Rights and Interests? Different courts have different interpretations according to different understanding, and there have also been different judgments in judicial practices.

reality. This would ease the conflicts between the stability of law and the needs of a changing society. On one hand, through individual cases, the law may develop gradually and justice could be achieved; and on the other hand, this would help protect the stability and sacredness of the law.

All of the above have formed the root of legal interpretation and have helped to explain the relativity of 'trial by law' in the modern society. The next question then might be how to interpret the law, or how to keep the reasonability of freedom in judgment? In theory there are two arguments to answer this question.

The first is the objective way, meaning to interpret the regulations strictly according to the original meaning of the articles and therefore avoid any subjective judgements. This argues that interpretation should be based on pure logical reasoning and would therefore keep accordance with the verdicts. German civil law scholar Savigny declared that interpretation of the law is simply 'a conceptualised calculation' with logic. The advantage of this theory is that people can easily anticipate the law's response to actions and this should in turn help maintain social order and avoid unrest. However, a legal system under this frame could become inflexible and rigid and, to some extent, it kills the creativity and vitality of the law and may even incur injustice in some cases.

The opposing argument is the subjective way. Because the law is abstract and vague and even contains some blind spots, judges should be allowed to interpret the law according to personal understanding. The law would then be like an empty bag with judges able to put whatever they want into that bag. Hutcheson, an American judge and follower of this argument, states that during the procedure, judges should make decisions according to their feelings and give verdicts by anticipation instead of logical reasoning. The subjective way aids in achieving justice in individual cases and avoids inflexibility and limitation to some extent, however it leads to a situation where judges have no constraints on them and general society has no clear legal guidelines to follow.
Modern society requires that people be given 'peaceful periods' and those situations that could harm the objectivity and assurance of the law should be excluded, however, judges should have a certain amount of freedom and flexibility to judge. As a result, in this issue, I believe a 'happy medium' or combination of the two arguments to be the best solution. This would involve giving judges a certain degree of freedom and discretion while at the same time limiting their powers to protect the objectivity of the law. Before this idea can become a reality, there are two issues that need to be addressed.

The first relates to thoughts, or how to understand the objectivity of the modern law. Objectivity

does not refer to the concept used in ontology, or in science. In this case, objective means to be reasonable, and further it means 'not personal, capricious or political (in a narrow sense), be convinced but open to discuss'.[129] Therefore, the objectivity is revisable. In other words, the objectivity is a kind of subject built up by thoughts and should be revisable.

The second issue relates to the institution of a legal system. In order to protect the orthodoxy of revisable objectivity or, in other words, to avoid vagueness and make legal regulations more foreseeable, the modern society emphasises the construction of a legal system. In this system legality should be the basis of a freedom of judgment. This freedom should also be constrained by principles and other policies, for example, the principle of innocent until proven guilty. Additionally, the system should be set up to improve conversation between the parties involved in the procedure. In other words, legal knowledge and techniques should be discussed among scholars, lawyers, judges and other legal professionals to ensure that the freedom of discretion is in accordance with justice and social policy.

This freedom of discretion can also be found in the traditional judicial system although it is in a different form. In the traditional judicial system judges are free to act according to personal will and avoid mentioning that actions have gone beyond the law or standards. It is also quite common in a traditional society for judges to act in an opportunistic fashion; while in the modern society this freedom of discretion is confined by rules and clear boundaries.

In summary, the legal system in a traditional society can be referred to as 'trial by sovereign' rather than simply trial by law, as it is in a modern society. This does not mean that there is no law to follow, just that the law is not an organised system. The ruler could try with their will and ignore any laws or principles. As Weber stated, it is the will of the sovereign that forms the law.

D. Judicial Procedure

One of the common features of the traditional and the modern court system is that both hand out decisions according to a certain procedure, form and order. However, these procedures, form and order differ in between the two systems. Judicial systems in different societies use different forms of procedure to pass the legal spirit onto the public and grant judges' verdicts different legality and authority.[130] Procedures in the traditional judicial system and the modern are distinct.

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[129] Richard A. Posner, *the Problems of Jurisprudence* (1990) 9.

[130] A survey which was conducted by American psychologist Tom R. Tyler showed that people prefer to abide by law while they taste the justice of legal authorities. However in people's mental view, the justice of legal authorities is related to a procedural justice, rather than be related to the result of a hearing. See Tom R. Tyler, *Why People Obey the Law* (1990).

1. Levels of independence

The level of independence refers to the degree of separation that the procedure has from the statute and the degree to which it has its own purpose and form. The traditional and the modern judicial systems are very different in this regard. In the traditional system, the function of procedural law is regarded as an 'absolute instrument', in that it has no specific purpose for existence, instead it is there for the purpose of something else. It is valuable only when it is useful to other subjects such as the substantive purpose regulated by the substantive law. Accordingly, the aim of a criminal procedure would be to catch and punish crimes. Therefore, tasks of the substantive law are on the same level as ones from procedure law and vice versa. Substantive law is a master of procedure; how to design, and whether or not to design, the procedure and its rules are subject to the accomplishment of the tasks of substantive law. When deciding whether a procedure should be used or not, or how it should be used, the crucial question is whether it brings any value to the substantive. Therefore, the procedure could be regarded as an auxiliary or a subsidiary.

In contrast, the procedure in the modern judicial system has its own meaning and value; it cannot be replaced by the substantive and sometimes might even be contradictory to the substantive. In other words, the substantive may have to be sacrificed for the accomplishment of the procedure. This is obvious in the criminal procedure. If the object is to punish at any cost, the judiciary should have a great deal of power and constraints should be reduced as much as possible. However, most countries have established regulations to limit the powers and try to avoid any abuse that might harm the public. Therefore, the powers should be limited for the protection of the people's rights and this may impair the fulfilment of substantive law.

Therefore, how independent and unique should the procedure be? There are different arguments and solutions both in theory and in practice. One of these arguments is the procedural standard. This states that the value of the procedure depends on its internal characteristics and intrinsic value rather than its usefulness in achieving other aims.[131] Thus, the criteria used to judge a procedure should be completely different from those used for estimating substantive law. The procedure should also be set up according to its own ethos or background. Another argument in this topic is the relative instrumentalism. This states that although procedure has its uniqueness, it also has the characteristic of serving the substantive aims of the law. In other words, while the procedure has to pursue its own unique value it also has to accompany and aid the substantive. This means that procedure should be built up for the above two purposes and cannot contain any biases. This raises the same questions:

[131] Chen Ruihua, *The Theory of Criminal Justice* (1997)27 – 38.

in the process of legislation and jurisdiction, how do we sort out the substantial purpose and the unique values of procedure? Which comes first when there are conflicts? To this, there are two solutions.

The first is to give precedence to substantive law, that is, the substantive has priority when the aims and values of procedure are weighed up. Only when the substantive law aims are guaranteed or not being harmed are the values of the procedure considered. The other solution puts the establishment and application of the procedure first. Only when this is completed is the achievement of substantive law addressed. In practice, both of these solutions can be found in many countries. In regards to the criminal procedure for example, the common law system has a very different ethos from the continental. The former recognises that human rights should be protected while punishing crimes; basic rights are sacred and inviolable and should not be harmed by government. Therefore, the judiciary should be careful with their activities and only investigate and punish crimes in ways that the individual's basic legal rights are protected. In contrast, the continental system emphasises the need to control crimes, and accepts that the protection of civil rights may have to be curtailed in the interest of criminal justice.

The expression of law is affected largely by the independence of the procedure. In the modern judicial system, procedural law is separated from substantive law, and criminal and civil procedures are separated. In many countries, procedural laws have been introduced, for example, there are now criminal and civil procedures in Germany, France and Japan. In addition, the importance of the independence of procedure has been recognised by the constitution. There is generally an article in many national constitutions that relates to the judicial procedure, such as the independence of judiciary. Some countries even introduce many articles regarding this issue.[132] For instance, the Constitution of the United States contains certain content about procedure particularly criminal procedure: the 4th Amendment is about search and seizure. Fifth Amendment Article 5 refers to no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Article 6 is to require the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against

[132] Dong Yunhu & Liu Wuping edited, *Selected Materials in Human Rights Studies* (1993).

him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[133]

However in the traditional judicial system, the legal procedure is not important and is sometimes not even separated from the substantial, or alternatively criminal and civil procedures are not separated. Additionally, few constitutions in traditional societies have articles referring to procedure.

2. Levels of rationality

In the theory of social science and in social practice of human society, rationality and relevant concepts are determined by the social practice. As far as rationality is concerned, we can study it from several different aspects. With respect to the mode of action, rationality means capability to self-control; with respect to axiology, rationality concerns evaluation standards such as thoughts, wisdom, kindness, beauty and ugliness, and also a kind of comprehension; with respect to epistemology, and rationality is the ability to think logically. Although these concepts are related but confronted, overlapped but different, it is still possible to briefly summarise the concept of rationality as an aim that people pursue under the premise of conscience and knowledge, regarding science and the interests of society, to make reality more reasonable.

It is not only possible but also appropriate to use the above theory to analyse issues in the social, political and legal areas. Max Weber has performed outstanding research in this area, in which he states and proves the concepts of a rational nation, rational law and even a rationalisation of legal procedure.[134] Although his entire theory is not perfect, his use of rationality as a criterion for separating different kinds of judicial systems is helpful for our topic. It can also be used to judge the legal procedure. A procedure with higher levels of rationality would represent a part of the modern judicial system, while lower levels would be a distinguishing feature of the traditional system. More specifically, the differences in rationality in the two judicial systems can be presented as three aspects, discussed below.

Firstly, the rationality of judgments differs in modern and traditional judicial procedures. In the modern procedure, judges give decisions based on their belief in the facts, which depends on evidence gleaned through questions and arguments in the courtroom. In contrast, decisions are not necessarily based on evidence in traditional courts. As mentioned previously, messages from

[133] *The Constitution of the United States*, http://www.usconstitution.net/const.html#Article5 at 26 Nov 2004.
[134] Max Weber, *Economy and Society* (1978) 179-272.

ancestors, judging by fire and other supernatural powers were once popular methods for judges to come to a decision. Meanwhile, the formal evidence system has constraints on the freedom of discretion. For example, the Caroline criminal code in Medieval Europe has strict rules for how judges could use certain evidence in certain circumstances giving judges little or no freedom of discretion.

Secondly, the rationality of verdicts is different. This refers to whether the result has been demonstrated fully and whether it has been logically derived from the trial. The modern judicial procedure could answer this question positively. The rationality of the verdict in the modern judicial system appears in legitimate documents, which include the rationality of legal activities particularly in high profile cases. In other words, one of the most important features of the modern judicial system is giving a full demonstration of how the final verdict was reached and the relative legal arguments considered. For example, the statement of facts in the judgment of the initial court in Germany is quite detailed and wide-ranging, its demonstration is full of legal sense and the logical reasoning has reached the highest level. In the United States, a country where 'judge made law' is well recognised, the reasons for the judgment has to be adequate as well, in order to guard against any criticism of unfairness or arbitrariness.[135]

In the judgment of *Roe v. Wade*,[136] there is a large section demonstrating the basis of the legality and powers of courts, the relationship between judgements and the construction of legal system as well as the value of 'stare decisis'. The judgment is almost equivalent to an academic thesis with its complete explanation, reasoning and demonstration. This detailed description of a legal decision and motive allows judges to find the most appropriate way to solve a number of future disputes and convinces the public of their accumulating experience and suitability. In the traditional judicial system however, the reasoning behind judgements is not made common knowledge. In the beginning, legal rules had not been established, or if they had it was still common in some countries to keep the law and punishment secret and, therefore, judges were not required to give a full demonstration if their decision.

Thirdly, the efficiency of the procedural design is different. Considering the cost of introducing certain rules to achieve aims is one of the main differences between the traditional and modern judicial systems. In a modern society, with the development of technology, transport, the increase in population, increased awareness of rights and a higher number of lawsuits, there are greater

[135] Song Bing edited, *Procedure, Justice and Modernization – Foreign Legal Scholars' Speeches in China* (1998).
[136] Roe v. Wade, 410 U.S 113, 93 s. Ct. 705, 35 L. Ed. 2d 147 (1973)

demands for the efficiency of the legal procedure. This is because no matter how perfectly justice could be achieve through trial, if the costs are too high the people will be less likely go to trial. Furthermore, with the huge demands for the relief of most people, a judicial system lacking any concept of cost efficiency would cause more problems in its functioning. Therefore, the modern procedure places a much stronger emphasis on a combination of rationality and efficiency, while minimising any obstacles or waste and maximising the outcome. There are many methods used to pursue the efficiency of legal procedure; the two best examples follow.

Firstly, there is the principle of classifying cases depending on whether they are simple or complex, meaning whether they can be resolved with a simple procedure by the parties' choice or by the law's definition, or whether they must be tried with common procedure. In civil suits, it has been suggested that some simplified procedures should be introduced for cases involving small compensation amounts. Additionally, conciliation proceedings, arbitration and other non-legal measures are encouraged to replace the legal procedure. This is also the case in criminal suits.

The other example is the establishment of the principle of res judicata and no double jeopardy. Generally, the former is an important principle of civil procedure and the latter involves criminal procedures. The principle that one issue cannot be resolved twice basically means that once a decision has been made, no matter what the result, this signifies the end of litigation. Should one of the parties try to bring any other proceedings to the court regarding the initial action, the court should disallow this request. This is an important principle of the criminal trial as it protects the rights of the defendant and avoids repeating trials. However, this is not the way of civil cases. The reason for this is that the issues of interest may vary even when a judgment has been recorded. Therefore, no two cases are the same in the civil area if we take the element of time into account. The purpose of a civil trial is to determine whether the claim related to the argument exists and whether there are interests that need protection and so even if the plaintiff brings the suit to court again, it should be accepted. For example, if the debtor requires a lawsuit to affirm that the debt does not exist after a settlement was ordered; the court should still open a session. In this case, however, it is dangerous to go to extremes. For achieving substantive justice in an individual case, it is necessary to remain a certain buffer for re-suit or re-hearing under the principle of the res judicata. However, it should obey other statutory rules such as the valid time to bring the suit and legal claims, and it should be regarded as a exceptional means of relief. More specifically a retrial regarding the civil case could be brought only by the parties involved, and the cause must be because the previous judgment is illegal. In criminal law, according to the spirit of modern rule by law, the retrial can only be launched for the benefit of the defendant, and cumulative penalties are

forbidden in retrial.

In the traditional society, there is no developed commodity economy and there are relatively few lawsuits. People in these societies think more highly of the substantial justice more than the stability of the procedure, as the efficiency of the lawsuit is not regarded as the crucial issue. Therefore, the drafter and the applicants in a traditional court system do not pay sufficient attention to the efficiency of the system, which naturally leads to inefficiencies in practice. Res judicata is not a common principle in the traditional society and as such resources are often wasted by repeatedly opening court sessions to discuss the same dispute.

3. Different concepts of procedural justice

Justice is an ideal that people in many areas wish to achieve. In the area of law, justice does not only refer to the substantial but also to the procedural. The traditional and modern judicial systems differ in their explanations and grasp of justice in the procedural sense.

In the modern judicial system, there are three elements of procedural justice. The first is neutrality. This means that judges remain unbiased when hearing a trial and are not influenced by the identity, social status or wealth of either party. Neutrality consists of both static and dynamic elements. The static refers to the judge being a third party that has no relation to any of the parties involved in the trial; as the proverb says, 'no one can judge himself'. The dynamic is that all activities judges perform should be unbiased and not favour any one party. Additionally, judicial neutrality can also be divided into the formal and the substantial. In lawsuits where one party is superior to the other, judges should not only refer to the formal neutrality but also to the substantial and tilt a little to the disadvantaged minority to achieve the substantive justice.

The second element is sufficiency. All parties have the right to access relevant information related to their legal action, and also should be given the chance to state their own case and retort upon the other's case. The theory of proper procedure advocated by the common law system in modern society is very close to the sufficiency element. The bottom line of procedural justice is that when the rights and obligations of a person will be changed by a judgment, that person should have a guarantee to be informed and to have the chance to state their argument.

The third element is openness or transparency, which is the basic principle of the Universal Declaration of Human Rights and The International Covenant on Civil and Political Rights. They

state that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.[137] According to this statement, (1) the procedure of a trial should be open to the public, from registry to the announcement of the case. There are some cases that should not be open to the public by law, however, people should be welcome to sit in the court and the media should be allowed to report it. (2) The judgment should be announced to the public along with the evidence, which includes documentations provided by parties, documents made by the court, and reasons given by the judge. When all of these are open to the public, the people can give their own review and judgements. (3) The courts have responsibilities to the parties involved and to the public. To the former, crucial legal activities such as investigating the evidence must be carried out with both parties present. To the latter, all people should be allowed to audit in principle and examine the relevant information. However, there are sometimes conflicts between the media and judicial independence, a topic which has been previously demonstrated.

The traditional judicial system does not exclude procedural justice; however the levels of procedural justice are far below the modern system. Firstly, the neutrality of the judge is not a common principle. Although, the idea of the judge as an unbiased, third party has been around since establishment of judicial systems, governmental interference has become more and more common with the development of governmental powers. In medieval Europe, inquisition was very common, except in Britain. However, the Star Chamber in Britain once used inquisition as its mainstream trial form until the revolution. An inquisition meant that the power and right to investigate, prosecute and trial were in the sole possession of the judge. Obviously, true justice could not exist under these conditions. Secondly, the traditional judiciary lacks sufficiency. Parties are always willing to express their point of view; in fact self defense was normal behaviour for both parties under the traditional system. However, inquisitions resulted in unnecessary constraints against debate and both the right to know and to state their case were exercised to a very limited extent. Finally,

[137] Universal Declaration of Human Rights, Article 10. http://www.hrweb.org/legal/udhr.html at 25 Oct 2004. The United Nations International Covenant on Civil and political Rights, Article 14. http://www.hrweb.org/legal/cpr.html at 25 Oct 2004.

transparency or openness to the public was almost non-existent; the trials were often secret trials or limited open trials.

4. Mandatory nature of procedure

In a modern judicial system, procedure is compulsory in three ways. The first is that procedure is made by law. In the modern society the legislative makes procedural laws by following certain rules and forms. This legislative body might be governmental agencies, or it might be the Supreme Court as it is in the United States. However, this is not the case in the traditional society, where the procedure is not necessarily regulated by the law. Some societies have simple rules for making laws and some don't have any at all. In medieval Europe, where common law was popular, the main standards of trial in the secular courts were customs and traditions exercised by the feudal lords, officials and judges.

The second aspect is that procedure cannot be violated. The modern procedure requires judges and both parties to obey and follow the procedure strictly. In other words, all parties must act according to the law and exercise their rights under these instructions. Additionally, parties are also constricted by their previous behaviour, meaning that any specific action or speech could be reinterpreted but not withdrawn or overturned. Facts and consequences recognised by proceedings are sealed and become the steady 'past'. Estoppels and res judicata are manifestations of this principle. In contrast, to spin a cocoon around oneself is not the aim or result of the traditional procedure; it pursues the core. Under some of the sovereignties like thearchy, Max Weber states, the judicial system serve substantive value. For substantial justice, the procedure can be violated or surpassed.

The third element is the sanction for violation of the procedure, which is the result of the second aspect. It can be brought in two forms under the modern judicial system. One is to punish the violator, for example through the charge of contempt of court in common law countries. The other is the dual correction of procedure and substantial consequence. In the former, it means previous behaviour becomes null because of the violation; in the latter, it means the consequences incurred by the violation, including the judgment, become null as well. A good example of this is the principle that evidence from an illegal procedure should not be used. The violation of procedure is not uncommon in the traditional judicial system where instrumental absolutism is popular.

5. Different degrees of moderation

The moderation or peace of procedure could be seen in two ways. On one hand, the intrinsic character of a procedure is peaceful. The procedure and forms of the modern judicial procedure do not involve violence, no matter what the outside measures or the inside contents are. Although there are some forcing measures such as custody, these have the constraints of not offending the human dignity so that basic human rights are protected. In fact, the motive of bringing a lawsuit is to resolve a problem in a moderate and peaceful way. The structure of the procedure indicates its peaceful purpose. Firstly, parties are encouraged to express their disagreements and complaints thereby controlling the confrontation and avoiding violence. Secondly, parties involved are told they must take full responsibility for their actions during the procedure and accept the result. Therefore, a system of responsibility is established and the willingness to accept the final verdict is increased. The modern procedure is not only a confronting procedure when resolving a dispute, but also a system that tries to reveal, release and resolve conflicts in a controlled environment to achieve a peaceful outcome. In contrast, it is very common to see judges resolving disputes by arbitrary measures in the traditional judicial system. Parties' rights are restricted and conflicts and disagreements are compressed instead of being resolved. In these circumstances, it is difficult for parties and the public to be confident with the legality and justice of a judgment. Neither the procedure nor the result resolves disputes peacefully. . In fact, it is likely that the conflict may arise again causing a vicious cycle.

6. Different leading participants during the procedure

Who should take a leading role in the judicial procedure? The traditional judicial system and the modern have different arrangements. In the modern society, citizens' legal status is affirmed by the constitution and laws; the design and running of the state system are dependent on the people's will. Therefore, parties and the relatives should be respected as the subjects of the procedure rather than the objects; they decide how to form and run the judicial system in order to protect their own rights.

Firstly, citizens have the right to access the court, talk to the judge and use the facilities of the court; these rights should be supported by the court instead of obstructed. Therefore, it is important that the conditions and requirements to bring a lawsuit are not restrictive. The court should do its best to clear the way and if there are flaws in the case, the court should not simply discard the case but should give the parties a chance to correct the flaws. Additionally, it should be the responsibility of the courts to try to reduce the costs.[138] If the price of a lawsuit is too high people would feel blocked from using the legal procedure. Although the government is not obliged to exempt court fees, and

[138] Trial costs include three sections: court costs, lawyer's costs and bribery costs.

nor would it be feasible to do so, when a lawsuit is the only means possible for solving a dispute, the courts should allow the fees to be paid at a later date. Otherwise, the courts would be going against their initial principle to protect the people equally and it would also deprive the people's right to access the courts. Both the Supreme Court of the United States and Constitutional Tribunal of Italy found that the collection of legal fees prior to the lawsuit goes against the Constitution.[139] To those who cannot bring a lawsuit through the normal procedure or cannot afford the fees, the government should set up a system of legal aid, whereby the government hires lawyers to serve people on consultation and representation. Additionally, different types of legal procedures should be introduced to meet different requirements, for example, the special procedure for claims of small amounts or disputes related to consumers.

Secondly, parties should in control of the conduct of their own case. They are responsible for the proper conduct of their case. They present the case, lead of evidence, and make arguments. The judge acts only as a sort of umpire, and his involvement, therefore, should be in a limited capacity.

Thirdly, there is the aspect of oversight, it is very important in a democracy that citizens should be able to supervise the actions of governmental agencies. Without this supervision, courts may depart from the needs of society and slip into autarchy and despotism, which is a basic betrayal of the people. Despotism is obviously an extreme situation, realistically, without supervision judges may lose their sense of current issues and fail to act with flexibility. Therefore, different forms of supervision should be introduced. For example, there is the jury system, which allows people to participate in the procedure directly. Additionally people can have a say in the selection and evaluation of judges' appointments. Judges are elected in some states of the United States. The basic reasoning behind the system of supervision is that it allows people, including the media, to discuss and criticise the procedure and its content, which in turn builds up a accountability in the judicial system. However, this kind of supervision must have restrictions. The supervision should not disturb the normal procedure of the court, nor should it interfere with judicial independence and justice. Occasionally, some parties that are not directly related to the case are allowed to voice their opinions on the facts and application of the law, and sometimes judges even invite the opinions of relevant organisations and individuals. This can be regarded as a way of supervision and also a way of participation, the 'friend of the court' is a perfect example of this supervision. This system includes many groups of American society that are invited to state their opinions regarding to cases

[139] Boddie v. Connecteut, 401 U.S 371, 91 S. Ct 780, 28 L. Ed. 2d 113 (1971). Italian Constitutional Court, Decision of 23, Nov. 1960.

brought before the courts.[140]

There is nothing akin to supervision in the traditional judicial system. This system is based around the judge as the central character with the procedure serving the requirements of judges so they can accomplish their duties. If the modern judicial system is described as 'warm and humane', then they traditional system would be 'cold'. In the traditional system there are many restrictions to accessing the courts, the state has the leading role and the progress and results of lawsuits are barely influenced by the parties' will.

E. Judicial Function

The concept of function has been used broadly in many areas like sociology, politics and law. In the legal area, the basic definition of the function is to perform, execute and administer; it is the natural and proper action of any activity appropriate to a business or profession.[141]

One of the best ways to research modernisation is to explore and compare the structures and function of the institutions of traditional and modern societies. After that we can identify the key differences between the modern and the traditional judicial systems, according to such aspects as the separation of functions and the level of diversity. If we recognise the traditional society as one with no separation of functions, then the modern society would be the one with a high diversity of functions. In this society responsibilities are separated and sometimes one single role may have multiple functions.

The best way to analyse and compare the two systems is by citing the research on function issues presented by those scholars specialising in research on modernisation. As Posner says, law is functional.[142] Durkheim, who has researched social relationships, stated that forms of society could be divided into the mechanical and organic and, accordingly, the law could be divided into two types, the inhibition and the indemnifying. The basic function of the former is to express and protect the 'mechanical unity', while the latter aims to maintain the 'organic unity'. Maintaining organic unity basically means that with the lack of common sense of value, which is the basis of social unity, the law should protect the unity of a community by providing regulations suitable for the division of work in modern society.[143] Meanwhile Parsons divided social functions into four categories:

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[140] Song Bing edited, *Reading: Judicial Systems and Judicial Procedure in America, Japan and Germany* (1998).
[141] *Black's Law Dictionary* (1979) 605 – 606.
[142] Richard A. Posner, *the Problems of Jurisprudence* (1990).
[143] Roger Cotterrell, *The Sociology of Law: An Introduction* (1984).

pursuing goals, maintaining mode, adjusting to the environment and protecting the unity of the internal system of society. He emphasises that the main functions of the law are to maintain the unity of the community and harmonise rights and obligations among citizens. He further points out that the functions of the law are different in the traditional and modern societies. The criteria for the differences are whether the unity and its protection have been separated and whether they are maintained by subsidiary branches.[144] The former dean of Harvard Law School, Roscoe Pound, suggested that the law is a social project to maintain the order. He states that demands and conflicts of interests from multiple parties are the basis of judiciary work, and the law stands on the common will of the community and tries to balance the interests by a reasonable means. It only exists in a modern society and could not be introduced in early ages of legal history, because at that time the function of the law was mainly to avoid unrest and grant the most freedom to the privileged.[145]

1. Direct functions in the two judicial systems

Obviously the above arguments from scholars are valuable to our research. However, they are quite abstract and theoretical so we cannot take them for granted. To understand the definition of the function and the theory of common application, it is important that we analyse the history of the judicial system and its development. Then it will be possible to study and summarise the distinctions between the traditional and the modern judicial systems. Personally, I believe the functions of any judicial system can be divided into its direct functions and its extended ones. The former is crucial in the formation of the judicial system, while the latter depends on the former and is only effective after the former has been achieved. These two aspects are different in the traditional judicial system and the modern one. More specifically, functions in the traditional judicial system are unitary and limited, while the functions in the modern system are more diverse and powerful.

It is well accepted amongst scholars that the direct function of the judicial system is resolving disputes.[146] Therefore resolving disputes is the common feature of the judicial system and it is the basis, major content and direct responsibility of the judiciary. Without this function, other functions cannot be brought into play. However, the ways of resolving disputes differ between the two types of judicial system.

i. The status of the court. Conflicts and confrontations based on the division of social roles have

[144] Ibid.
[145] Ibid. Roscoe Pound, *Social Control Through Law* (1942).
[146] Roger Cotterrell, *The Sociology of Law: An Introduction* (1984).

increased with the development of human society and it is necessary for society to establish a system to resolve these conflicts. Although both the traditional and modern societies have courts, their social status is very different.

Firstly, the scopes of responsibility are different. In the modern society, courts are responsible for the resolution of most disputes and, except the very small cases that cannot be brought to court, every dispute can be resolved through a legal procedure. The system is designed to meet most of the requirements and drafters of constitutions expressly of by implication empower the courts to accept most cases. In the United States almost every issue can be brought before the courts, except political issues.[147] All disputes between individuals or organisations or among individuals, organisations and the government can be handled by the courts, and occasionally disputes between government agencies can be tried by courts.

More specifically, as long as the following conditions are satisfied, disputes can be handled by the legal system. Firstly, there must be parties who are plaintiff and defendant. Secondly, the claim must be of legal interest and caused as a matter of fact and not as a hypothetical case. This is the most crucial condition. Thirdly, the arguments should be genuine and detailed rather than abstract or based on presumptions. Finally, the dispute is of the kind that will be appropriately resolved through a legal procedure, that is, the courts are capable of reaching a verdict according to the law and this verdict can be enforced through certain procedures. In reality, most legal disputes meet these requirements.

The second difference between the modern and the traditional justice systems concerns the usual ways of solving conflict. In the modern society, going through a legal procedure is the most common way to resolve disputes and the courts are the main forum for resolution. This is the mainstream method of the modern society. However, this does not mean that other ways have no use, nor does it mean that the courts have a monopoly in handling disputes. Often, the cost of a legal procedure is so high that many countries regard it as a burden. Especially in countries with limited resources, legal procedures would not be recommended. Therefore, certain characteristics of the legal procedure, such delay, excessive formality and confrontational nature make it unsuitable for resolving many problems. Also conflicts such as domestic arguments might not be appropriate for a judge to make a decision on. The dispute resolving system is developed gradually or designed according to rational theory. In this system, methods other than legal procedures are also valuable,

[147] Traditionally these issues are related to the president or parliament within the areas of diplomacy, national security and rights of war. See Nigel Bowles, *the Government and politics of the United States* (1993).

such as negotiation outside of court, by 'good offices' or by sub-legal solutions as Golding suggests. They include arbitration, mediation and treatable adjustment.[148] Occasionally, the executive and the legislative might also be responsible for dispute resolution. The above constitutes the broad scope of a dispute resolving system. There are certain types of cases, such as murder charges, which can only be handled in court; if someone were to attempt to punish someone they thought had committed the crime they are likely to find themselves in court as well.

The broad scope of the law is designed by the law makers. Accordingly the judicial system is used frequently in the modern society; the people are well aware of their rights and are ready to fight for them. The idea of using the court to protect the rights of the people is very common and is advocated by the government through certain policies. Many countries regard the courts as the main organisations to resolve disputes. As Roger Cotterell states, it is well accepted that the courts and legal procedures have become the centre stage of the legal system.[149] Some scholars, such as Holmes, Gray, Llewellyn and Jerome Frank, go even further; they regard the law as the judgements handed out by judges. Llewellyn believes that the law is the decision made by government officials, while Frank believes that the law is constituted by verdicts.[150] In some countries, such as the United States and Australia, bringing a dispute before a court is almost a human instinct when they find themselves in trouble. In other countries like Germany and France, although the judicial systems are not used as frequently as in the USA, they are being used more and more frequently, and are used more now than ever before.

In contrast, in the traditional society the judicial system is not used much either in theory or in practice. Although the government or other public agencies are designed to resolve disputes, it is not the monopoly of the government, according to Robert Nozick. Even a country with a minor court system would use the military, police and courts to handle disputes. In fact, no matter what type of country it is, the traditional society still has a limited control on administrative areas. The sovereign does not have a monopoly on using violence and lacks certain methods to control civil life particularly in the many areas of society that are independent. Therefore, on the occasion that national security is not affected directly, the enforcement of justice is usually brought about without any formal legal procedure. It is quite common for parties to handle the disputes on their own or have a social organisation take care of it. Additionally, the government would use military ways or violence and reduce judicial ways of handling conflicts. Even in an organisation like the court, dispute solving methods can be quite extreme. For example, the Star Chamber in England, under the

[148] Martin P. Golding, *Philosophy of Law* (1974).
[149] Roger Cotterrell, *The Sociology of Law: An Introduction* (1984).
[150] Zhang Wenxian, *Modern Western Legal Philosophies* (1986).

1487 Act, was given a wide scope of responsibilities on judicial issues, including torture.[151] Therefore, parties involved in arguments tended to use informal methods such as arbitration to solve their problems and avoid government intervention. This generally led to the use of 'good offices' or violence. Governments are not usually against people solving their problems outside the courts and sometimes even support it. Zweigert and Koetz observed that, although there is an integrated court system in Japan, 'civil' disputes are mainly resolved by social organisations.[152] Japanese scholar, Kawashima, found that even contemporarily, traditional ways such as 'good offices' and arbitration are still in use.

ii. The priority of the courts. In a modern society, the legal procedure is the highest authority for resolving disputes. This is the case for individuals, social organisations and even governmental agencies. There are two aspects to the priority of the courts. Firstly, legal procedure comes first and if any other method comes into conflict with it the legal procedure, the latter prevails. For example, in the middle of the 20th Century in the United States, many individual committees were handling large amounts of administrative cases but they were still subject to judicial review meaning that the courts had the right to correct their decisions.[153] Secondly, legal ways are exclusive. Once a party has chosen to follow the legal procedure, it cannot bring any other action. Once a procedure has begun parties cannot easily waive or change their choice ex parte.

In contrast, in the traditional society, the judicial procedure is not necessarily superior to other methods. In fact, the judiciary could not step into the process arbitrarily, for example, in disputes among family members. Thus, legal procedure does not have the highest authority, once the party has chosen a particular way to solve their problem; they lose their chance to bring about a law suit simultaneously.

iii. Different types of disputes are handled by the courts. A key difference between the modern and the traditional judicial systems is the types of parties involved in disputes. As mentioned above, the modern society is highly divided and the social roles are separated. It also generally has a complicated structure with diverse interests. Accordingly, the amount and the types of conflicts are numerous and often complicated, particularly regarding the subject. The courts must handle not just those disputes between two people, but also disputes among organisations, including government agencies, enterprises and not-for-profit organisations. They state might be the plaintiff like in the *United States v. Microsoft Corp.* or might be the defendant as in those pollution cases that were

[151] Harold Potter, *An Introduction to the History of English Law* (1923).
[152] K.Zweigert & H.Kotz, *An Introduction to Comparative Law* (1998).
[153] Nigel Bowles, *the Government and politics of the United States* (1993).

commonly seen in the 1960s and 1970s in Japan. Additionally, there might be more than one plaintiff or defendant; it is possible for several plaintiffs to bring a lawsuit against one defendant, one plaintiff against several defendants, multiple plaintiffs against multiple defendants, or a plaintiff and defendant and a third party. The new class action lawsuit, seen first in the late 20th Century, increases the number of participants. These kinds of lawsuits have become more and more popular, in the United States particularly, and often result in revisions of legal procedure. Among recent class actions are lawsuits brought by representatives of students, patients and consumers buying certain models of cars. Another more famous example is the case where customers from many states of America sued the big cigarette companies for harming their health, from which a positive result was achieved.

In the traditional society, due to the low levels of separation in social responsibilities and the lack of organisations with different characters and functions, the forms of social subjects are limited and conflicts between them are mostly handled by administrative procedures. Although there were some enterprises resembling the modern concept in some European countries in late medieval times, the institution of the corporation with independent property and limited responsibility was at its infancy. Therefore, although courts specialising in business disputes did exist, the typical type of dispute dealt with by the courts was the 'one on one' mode among natural person.

The types and characteristics of conflicts handled by traditional and modern courts are also different. Traditional courts tend to handle criminal cases by enforcing punishments; civil cases are not a central function. As Professor Selznick and Nonet observed, those ancient nations and central governments tend to have the 'inhibition' legal system. The initial aim was public security which led to criminal law becoming a chief concern of officials and hence a typical way to express the authority of law.[154] There were some civil cases in the courts; however these were generally related to personal rights and property. As Berman observed when he was talking about the scope of judicial power in medieval Europe, it was mainly about marriage, wills, succession, property and contact.[155]

In contrast, the scope of the modern courts is much wider. Criminal cases are not the main types of suits and the number of civil cases increases dramatically, and in fact, handling civil cases tends to be the main task of the courts. There are even specialised courts established for dealing with civil cases such as the Commercial Court, Maritime Court, Bankruptcy Court and Labor Court. The

[154] P. Nonet & P. Selznick, *Law and Society in Transition: Toward Responsive Law* (1978).
[155] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

development of the market economy makes people more aware of their personal and property rights, which leads to new types of rights regarding private information, personal reputation and consumer rights. This in turn complicates cases, as a case regarding public harmfulness now contains many complicated facts and techniques.

The degree of governmental intervention in the traditional and modern courts is also different. In the modern society, the 'supervision' is highly extended and ensured with enforcements, and legal verdicts deeply affect the individuals and organisations of a society. This gives judges the authority to order parties to do or not do something by making a decree. As scholars like Burns observe, judges have become managers of psychiatric hospitals, industry and business enterprises, and sometimes even directly handle management matters.[156]

In the traditional judicial system, on the other hand, a lack of national power and resources means this situation is rarely seen. There are not enough places for long-term custody so that imprisonment is not applied. Therefore, most punishments are more straight-forward, like 'an eye for an eye' or recovery of the original state meaning offenders compensate the victims or their families.

2. Extended function in the two judicial systems

In contrast to the similar direct functions, the extended functions of modern courts and traditional ones are very different. In fact the traditional court have no extended functions.

i. Function of control. The main function of the court is to maintain the social order and political authority. As Pound states, the law are a tool or method of social control, it maintains society and prevents people from going against the mainstream by forcing individuals to obey it.[157] Both the traditional and modern societies have the function of control; however they differ in detail.

Firstly, it is different in the way it acts. In a traditional society, as Pound observes, law is only one of the tools controlling the society, where morality and religion are the mainstreams, as it is in some Islamic countries. The law is more powerful in modern societies and has become the main instrument for social control.[158]

Secondly, the objects of the function look the same but are actually different. In appearance, there

[156] J. M. Burns, J. W. Peltason &T. E. Cronin, *Government by the People* (1990).
[157] Roscoe Pound, *Social Control Through Law* (1942).
[158] Ibid.

are the objective functions that maintain the system and also the subjective functions that shape and maintain ideology. Achieving the former usually involves resolving disputes. Because disputes are abnormal behaviours and harm existing social orders, the core of resolving disputes is the recovery and remedy of the destruction. As the latter, it often goes through the trial procedure. In other words, during the legal procedure all behaviours of the judge should follow certain values and principles. The rules and principles repeatedly articulated by courts become part of the law and shape mainstream behaviour. However, in reality, the function of control in the traditional judicial system is the power of the court given by the groups in power, making it a kind of 'top-down' and 'external' function. In other words, the control goes from the higher to the lower, which is common in ancient India and Rome. Therefore the law does not, and cannot, become the internal instrument to control the sovereign itself.

The modern judicial system has similar functions to maintain the social orders. Even in western countries nowadays, as Cotterrell observes, it is quite common to regard the law as simply a tool of governmental power.[159] However, the basis and core are different to the traditional judicial system. The functional basis of the modern judicial system is that parties who are equal in law (including individuals, organisations and government agencies) use the court system as the medium for expressing and adjusting their interests. By doing this, they can harmonise their conflicts, resolve disputes peacefully and finally achieve a rational result. Nevertheless, through the running of the legal system, modern courts attempt to achieve the recognition of 'legality' and adjust the values and ideology of society as a whole. Therefore, the function of control in a modern society is a kind of collective control instead of control by certain groups. It is both internal and external and emphasises peaceful resolutions. In Pound's point of view, the function of law is to express the will of all society members. The law and the courts take the common value as their basis and commitment to the harmony of community.[160]

ii. The function of constraints on powers. This is possibly the most important difference between the traditional and the modern judicial systems. In order to avoid the oppression and protect human rights, most modern countries have constraints on governmental powers; this is not the case in the traditional countries. Although in some traditional societies there were conflicts between governmental agencies, like the battle between the Royal Family and the High Court in France, there is seldom efficient limitation on the legislative and executive powers. The organs in traditional societies tend to be rivals in regard to gaining powers rather than serving as checks and balance for

[159] Roger Cotterrell, *The Sociology of Law: An Introduction* (1984).
[160] Roscoe Pound, *Social Control Through Law* (1942).

social interests.

The constraints on governmental powers in a modern society come in two forms. Firstly there is the judicial review of constitutionality. This is a legal procedure to ensure that the laws, orders or actions of the legislative and executive do not go against the Constitution. One of the basic human rights is that people should be able to avoid any illegal or harmful interference from their government. This procedure is supported by the constitutionalism that is a common feature of many modern societies. A constitution made by an elected assembly can be like a spiritual totem for a modern society. It has the highest level of authority and other laws or statutes cannot work against it. The courts are the guardians of this constitution and have the responsibility to interpret constitutional law. As Hamilton says, interpreting the law is the valid and special responsibility of the courts and this power to interpret the constitution and all kinds of laws made by the legislative should belong to the courts. If there is conflict between the two, which with the higher levels of authority prevail. Therefore, the courts should be empowered to announce the nullity of any legislation that has violated the constitution.[161] Furthermore, judicial review is the product of logical judicial powers and is the pith of modern judicial power. The character of the judicial review is the basic element of judicial power, and the court has gained the efficient tools to limit governmental powers. Judges have the right to decide the legality of legislative and executive acts The former can hardly be corrected under the legislative power and the latter has the shelter of executive powers and so judicial review is the only way to keep both subject to the law.

Hitherto, there are two forms of judicial review. One is the abstractive review, where regardless of certain cases, the law and orders are reviewed, as is the case in France. It is stated in the constitution that regulations made by government agencies and parliaments should be handed to the Constitutional Council (Conseil Constitutionnel) Committee for examination before they are enforced. Additionally, if a certain article might be regarded as a violation of the Constitution, the president, prime minister, presidents of the lower and higher house, or more than 60 representatives of the lower house or six or more senators could make a reference of the law to the Commission of Constitutional Law for judicial review. The president and premier of the two houses could also refer treaties for review. The other form of judicial review is through an individual case. This is common not only in local courts but also in Constitutional courts, and has been called a 'constitutional complaint'. It is common practice in the United States of America, Canada and Australia.

The authority of the courts to have the right of a judicial review increased the courts' status. The

[161] Alexander Hamilton, John Jay & James Madison, *The Federalist, A Commentary on the Constitution of the United States* (1980).

traditional status of the courts was as an organisation dealing with disputes, but the right of judicial review turned the courts into political agencies. Courts gained a status beyond that of the executive and particularly the legislative, because once it is established that the constitution is the ultimate criteria of legality for laws then the courts are in a very strong position of power that is not found under the traditional system. If this power was used frequently the courts might become 'super' legislative organs. Naturally, this is not possible and if it were it would meet with strong objections from the legislative and society, as shown by reactions to the decisions of the Supreme Court of United States in 1930s.

The other form of review is administrative review. This method focuses on situations where citizen's rights have been violated through the misconduct of officials who have failed to perform their duties, acted ultra vires, or denied due process. In a modern society, particularly following the transformation from the traditional 'police state' to a 'welfare state', the power of the executive has been extended greatly and it is therefore easier for the violation of civil rights to occur. As a result, constraints on powers are introduced. Administrative review was introduced for when disputes between the executive and public cannot be resolved properly by themselves or if it could, it would more likely harm the public interest. To many scholars, the administrative review has become a very important part of the Supreme Court of the United States: 1/3 of all the cases it deals with relate to administrative law only 1/4 of its cases relate to specific constitutional issues. It has become the trend to restrain the antipathetic abuse or arbitrary use of discretionary executive powers.[162]

There are two forms of the administrative review in modern society. The first is the normal court mode, which involves reviews in the standing courts for general cases including criminal and civil cases. The other form involves having the reviews in courts specialising in administrative issues. The uniqueness of administrative activities makes it difficult for common courts to handle and it therefore necessary to set up a specific administrative court and appoint experienced judges to serve on it. t. Another reason for the establishment of a special court, particularly in France and Germany, is the history of judicial interference in the executive. The reason for giving normal courts the power to hear administrative cases is not just that the judiciary may receive an advantage from the government when there is a separation of powers, but also system-makers want to see the courts act as the arbitrator of disputes between the government and its people and become the supervisor of governmental powers. In all events, the two forms lead to the same goal: limiting powers. As a result of this, the administrative review tribunal gradually became an organisation separated from the government departments and become the supervisor of administrative staff.

[162] Ernest Gellhorn & Ronald M. Levin, *Administrative Law and Proces* (1997).

iii. The function of making public policy. Public policy essentially refers to governmental aims to resolve social, economic and political issues. Public policy represents the goals formed during political procedures, reflects the results that decision-makers expect, and also presents the measures that these decision-makers believe would achieve those results. In the theory of political science, the decision-making is regarded as the monopoly of the sovereign; this is a concern for people in a modern society. This raises the question of whether the court system should be involved in this, and to what extent? The answers to these questions are different in the traditional and modern judicial systems.

In the traditional judicial system, judges make decisions according to current regulations and theory and it is the intrinsic responsibility of the courts to resolve disputes. In the whole system of governmental powers, the role the courts play is maintaining social security and order, while the policy-making is in the power of the sovereign. Even in the situation where this power is divided and granted to several departments, it is still concentrated in the central and local government and shared by the legislative and executive. Therefore, judges have not been empowered to participate in policy decisions. As mentioned above, there are some courts exercising legislative and executive powers, however this occurs when the 'courts' are central to that society.

In the modern judicial system, judges have a certain degree of power and involvement in policy-making. They can be involved in some macroscopic issues beyond a certain case through judicial procedure. In fact, judicial review could be regarded as sharing the power of policy-making. With regards to this it is important to note that it is related to the interpretation of law. As mentioned above, judges are given the freedom of discretion in the modern society and then, as a result, they are given a policy-making function also. When a certain issue is not regulated by a current law, judges are able to fill the gaps. When the law is not clear or there is a conflict based on justice and equity, judges are able to interpret the law or even create new case law. The decision in this circumstance goes a long way beyond the specific case, and its solution and demonstration may spread to the whole society and affect the policy-making in relative areas. It has become more obvious with the proliferation of class suits regarding issues such as pollution, consumer protection, and taxation.

The modern lawsuit may affect public interests. Sometimes the law may be unclear of sparse judges must give decisions based on the spirit of the law and social justice. There are three main differences between modern lawsuit and the traditional one. The first relates to the subjects. In the traditional lawsuit, parties are mainly individuals and common business organisations, with little

contrast in capability. In some cases one party, usually the defendant, is the government or a wealthy tycoon, creating a large disparity of resources between the parties. Additionally, as many people are influenced by public works, once there is any lawsuit related to one, there might be many plaintiffs creating a sweeping class lawsuit. The second difference relates to the claim. In the traditional system, the plaintiff always asks for compensation, restitution, or affirmation of rights. In the modern system the plaintiff may ask the public organisation, enterprise or even government agency to revise or change a policy or enforce certain measures to avoid a similar situation occurring again. It is also not uncommon to see an injunction invoked against certain activities. Therefore, the claims in the traditional system are specific, visible and objective while those in the modern system are uncertain, hard to predict and subjective. The third difference relates to the disputes. The basis for traditional lawsuits and their claim usual relates to personal interests and would therefore only affect groups that related to the parties involved in the suit. However in the modern society, the issue might concern more parties in public area, ensuring the lawsuit has a much larger influence on society.

There are two ways in which courts may intervene in public policy: the negative and the positive. The negative one has a long history. It intervenes into policy-making by nullifying a law of action. In other words, it shapes policy by deciding whether or not to validate law implementing some policy made by other agencies. The judgment about induced abortion, made by the Constitutional Review Tribunal in the Federal Republic of Germany in 1975, is an ideal example of the negative method. In the judgment, the judges held that a law passed in 1974 by the Government allowing people to have an induced abortion during the first 3 months of pregnancy was in appropriate. The review tribunal felt that the government should try their best to protect the life of the embryo under the criminal law.[163] Another example occurred in the United Kingdom in 1992 when the Conservative Party, led by John Major, decided to reduce the number of mines to 10, only to have this action declared illegal and inappropriate by the High Court.[164]

Although it is not used as frequently as the negative, the positive method of interpreting the law has its own history. Before the 20th Century, courts in the United States made a series of judgements that helped develop public policy. The early judgements made by the Supreme Court have become landmark precedents, including the well-known *Mabury v. Madison* in 1803 (judicial review of legislation); the 1816 Martin v. Hunter's Lessee (review on a decision of State Court); the 1819 McCulloch v. Maryland (the supremacy of federal law); and the 1824 Gibbons v. Ogden (Federal

[163] Christin Canfried, German Judicial Decision Maker: the Federal Constitutional Court, in Song Bing edited, *Reading: Judicial Systems and Judicial Procedure in America, Japan and Germany* (1998).
[164] Peter Leyland & Terry Woods, *Administrative Law* (1999).

regulation of inter-state commerce). These judgements helped define the construction of the federal and State powers, and promoted commerce. All the policies in this area were new and created through the Supreme Court interpreting the Constitution. Their impact on the United States Government and the entire society is equal to, or even greater than, the impact of the many controversial decisions made by the Supreme Court today. The series of judgements made with strong liberalism colours in the 20th Century, particularly in the 1950s when Earl Warren was the Chief Justice of the Supreme Court of the United States, actually related to the fields of civil rights and criminal laws. It was within these two domains that the Supreme Court widely participates, and sometimes leads, in the process of public policy-making. In the issue of segregation, particular regarding education, the influence of the Supreme Court has been strong. After the judgment of Brown v. Board of Education, the Supreme Court and lower courts made a series of decisions that advanced the integration of the races; in 1970, Judge McLellan of a local court even ordered the school bus service. In this circumstance, the courts' role is more than requesting the government not to do something, but also advising the government on what it should and how is should be done. As American scholars observe, the courts have crashed into many social and political areas.[165] This has led to much discussion about the choice between 'Judicial Restraint' and 'Judicial Activism' in American society.[166]

K. A. Mordell has observed that there is an interesting situation going on recently in Europe where the courts have been having more and more impact on politics. Additionally, some of the responsibilities of policy-making and political issues have moved from the parliament to the judiciary.[167] Most western countries, however, are not open to this idea and have very limited areas open to the courts. Germany and France empower their courts to take initiative, but not on the scale of the power of the Supreme Court of the United States of America. The Constitutional Council in France became active only after 1971 and Germany's was established after World War II. In the United Kingdom, the judiciary has certain powers to control the executive but does not have the veto on legislation, nor does it have any participation in policy-making. In Japan, although the Supreme Court was granted the power of judicial review after the World War II, for more than 50 years before this, 'Judicial Restraint' was practiced and many cases were avoided with the excuse that the cases were too political. Therefore, it is important not to overestimate the influence of the courts on public policy.

More importantly, separation of powers is the core of modern liberal democracy. Taking this and the

[165] Nigel Bowles, *the Government and politics of the United States* (1993).
[166] J. M. Burns, J. W. Peltason &T. E. Cronin, *Government by the People* (1990).
[167] K. A. Mordell, Legal Tradition and Culture in the Contemporary Europe, *Foreign Law Review* (1999)Issue 1.

nature of the judicial function into account, I am of the view that the judiciary should be restrained in entering the policy arena in any significant way. Even when the court does participate in policy-making, their role is different from that of the legislative and executive.

Firstly, the court can only act passively and they depend on the policy maker; courts cannot actively seek cases, they can only wait and hear cases present. Therefore, it is impossible for the judge to take the initiative and make new policy; instead judges can only be invited to participate in certain cases, which is a totally different situation from the legislative and executive.

Secondly, the scope of judicial powers limits the scope of policy-making by judges. Judges can only deal with those cases brought forward by a particular party and these are much fewer in number than what the legislative and executive receive. For example, judges are usually not a part of construction and high-tech projects organised by the government. Policies made by the courts often relate to the pure law area, such as the efficacy of a contract. As for the issues related to public schools and social welfare that frequently appear in modern society, the courts almost always deal with narrow categories such as issues of discrimination.

Thirdly, the inherent weakness of judicial power requires that courts be more cautious in policy-making. In principle, courts would only exercise that kind of power in very extreme circumstance, the reason being that neither the legislative nor the executive could tolerate the interference from courts for a long period of time. It is likely that they would counter strike in order to enter into the judiciary's domain to destroy the independence of the judiciary. From history we can see that such conflicts end usually in the courts being defeated by the inherent power of the legislative and executive. The debate on 'New Deal' that occurred between the President and the Supreme Court in United States in the 1930s is an illustration the end result being the war that the Supreme Court yielding to Congress.

Fourthly, the courts do not answer to the public, particular those appointed life judges. Generally, they would overrule policies made according to the majority based on their own personal opinions or their own understanding of the constitution. These rulings might lack rationality and even sometimes bring negative social impacts. The situation in 1930s, where many 'New Deal' were announced as null, blocked the advance of society to some extent. Therefore, the exercise of court's policy-making function should be unconventionality and the exercise of the function should not be regarded as an index on judging the operations of courts.

Fifthly, given the number of complicated social issues in society, the limitation of information related to policy-making is an obstacle for judges to participate in the policy-making process. All macro policy-making relies on information collection. However, one of the unique features of the legal proceeding is that judges must stay neutral and passive; meaning that judges cannot take the initiatives to collect information, judges must simply accept the materials handed in by the parties. These materials are inadequate for the accuracy and timely manner of the policy-making. For example, since the Supreme Court of United States does not have enough information of obscene cases, these have to be solved one by one meaning that after a long time the results for similar situations might be very different.

Finally, the impact of judicial policy-making is limited. As judges do not have their own means for execution, they must rely on the submission of the society and cooperation of the executive, which may not occur during cases related to macro policy-making. The reason behind this is that judgements would usually have an influence on the benefits of certain groups of people, which make these groups reluctant to follow or support the execution of judgements. An example of this occurred in 1952 in the United States, when Congress pointed out that had the Supreme Court let Truman stay in control of the private iron and steel industry it would have been blocked by the budget process. Another example occurred in the 1960s and 1970s, when the Supreme Court made a judgment stating that all students, including African-Americans should be sent to school on school buses, however, the implementation was not smooth due to objections from conservatives.

F. Judicial Professionals.

In philosophy the essence of legal activity is a kind of practice. As legal legal philosophers we need to analyse judges as they are the subjects of judicial activities. As judges apply the law, the quality of judges is a crucial element in the fulfillment of the functions of the judicial system. It can be seen through history that although law and order could be maintained in early times by those scholars specialising in substantial and procedural laws but without any law degree or qualified training, this would not happen in a modern society. Social life is more and more complicated and, accordingly, legal regulations have to be responsive in order to harmonise the interests and values of the many different groups in society. Additionally, to solve disputes or to find out the proper way to set up the dispute-solving mechanism becomes more difficult and so professional training is more necessary.[168] As a result, in contrast to the judges' lack of professional skills in the traditional judicial system, judges in the modern judicial system are mostly highly qualified.

[168] Henry W. Ehrmann, *Comparative Legal Culture* (1976).

1. Clarification: the relationship between justice and qualifications of judges

Before the relationship between justice and qualified judges can be explored a clarification of the concept of 'justice' is necessary. Justice, as used in this thesis, does not refer to a highly-abstract social standard[169] or virtual consensus, but rather to an explicit standard, which leads to a proper settlement of people's conflicts. From this point of view, justice has two meanings: firstly, it means the procedure by which legal disputes are settled. This due process of the law mirrors the old English concept of 'natural justice'.[170] Secondly, justice means the normative idea of the proper outcome to a case. Some people may feel that even after going through the due process of law they did not get justice; only when both of these two aspects are satisfied, can justice be achieved.

Justice, in this definition, is achieved though the judicial system and by the judges. The two aspects of justice, however, have different requirements of the judges. The due process requires judges to hear a case according to the process stipulated in law. This aspect is relatively easy to satisfy. Firstly, the due process itself is explicitly fixed in law, and therefore common people can determine whether or not the process is working. Secondly, according to litigation or procedural laws, judges of a higher court can reverse a judgment from a lower court simply because the judge there has reached his or her judgment without the due process.[171]

Compared to procedural justice, substantive justice is more complex because it requires proper application of and great faith in, law. Since there is no explicit standard to measure the judges' application of law, the judges have more flexibility in their judgements. However, it is only with a profound understanding of the relevant laws can judges properly apply the law. And only with great faith in law 'will' judges do the 'right thing'. Therefore, judges' 'quality', as used in here, has two meanings: (a) a profound understanding of laws; and (b) professional ethics. The first aspect enables judges to properly analyse a case, and the latter assures them willing to do so.

2. Specialisation in the modern judicial system

[169] The term 'social justice' was first used in 1840 by a Sicilian priest, and given prominence by Antonio in *La Consitutione Civile La Giustizia Sociale* in 1848. John Stuart Mill, a British philosopher and economist, gave this anthropomorphic approach to social questions almost canonical statutes for modern thinkers thirteen years later in *Utilitarianism*: Society should treat all equally well who have deserved equally well of it, that is, who have deserved equally well absolutely. This is the highest abstract standard of social and distributive justice; towards which all institutions, and the efforts of all virtuous citizens, should be made in the utmost degree to converge.
http://www.firsthings.com/ftissues/ft0012/opinion/novak. 06 June 2006

[170] The 'nature justice' is an old and complicated principle, and is understood differently by scholars. Generally speaking, it requires that: a) no one can judge a dispute in which he is involved; and b) both parties of the dispute have the right to present their opinions.

[171] *Administrative Litigation Law of the People's Republic of China*, article 61; *Criminal Procedure Law of the People's Republic of China*, article 189; and *Civil Procedure Law of the People's Republic of China*, article 153.

As mentioned above, in the modern society judges' responsibilities include: harmonising multiple interests and values in a rational manner following its own value and democratic spirit; handling the balance between trial by law and discretion; creating and developing precedents through individual cases to assure stability; avoiding a deadlock or lag of the legal development and also constraining the powers of other governmental agencies and appropriately participating in the policy-making, while ensuring the autonomy of the judiciary. Therefore, legal activities often occur in tense situations where there is at stake liberty and democracy, regulation and discretion, constraints on powers and judicial independence. As the leading role in this system, the judge is required to handle these conflicts and should have the capability to make a decision and keep the balance when necessary. Ordinary citizens can hardly be expected to have the relevant knowledge, techniques and skills, unless they are professionally trained.

The specialisation of the modern court system can be explored using the following aspects.

a. Legal activities use unique knowledge and techniques that differ from legislative and administrative activities as well as the activities carried out by social organisations and individuals.

Judges have specialised legal knowledge and relevant experiences; their legal activities are exercised with a strong academic backing and much practical experience. These activities are based on a great deal of practical experience in settling disputes and determining regulations, which is the law's structure and essence. As mentioned above, with the construction and development of the legal system, including the rapidly expanding statute and case law, a huge but exquisite macro system has been established and to handle disputes with regulations has become the main task of the judge. Therefore, legal knowledge is becoming vast and profound and accordingly the practical experience is accumulated and more developed. This is different to other vocations; in fact, it would be impossible for people to gain the relevant knowledge and experience without systematic study of the judicial system and professional training.

The way of demonstration is unique. As we know, in social science, the autonomy of methodology is the most important feature of 'legal order', meaning legal methods have different styles, comparing with the scientific analysis and demonstration in ethics, politics and economics.[172] It is my understanding that legal professionals have not only gained legal knowledge and skills, but have also obtained a unique way of thinking from legal education and practice. This unique way could be represented by the spirit to protect traditional moral principles and, more specifically, to exercise

[172] Roberto M. Unger, *Law in Modern Society* (1976).

duties in accordance with the law. In other words, when dealing with political, economic or social issues, the judge should always convert them to the relations of right and obligation, following the universal and formal rules or procedures, in order to handle them properly. In addition, the unique way could also be viewed in light of the Chinese idiom that states 'listen to both sides and you will be enlightened'. This means judges should listen to all of the different opinions and choose the best solution according to their unique feelings of balance, interpret and demonstrate the importance of the solution, make laws regarding it and make the law known to the public. Furthermore, the unique way of thinking could be presented by the syllogism. As the frequent way used by the Continental Legal System, syllogism has the current legislation as the major premise, the matter of fact proved by evidence as the minor premise, and the judgement as the conclusion. Analogism is also popular to the judges in Common Law System. In fact, it is through analogism that the core principle of Common Law, the doctrine of precedent, could be followed consistently. Because of that, Unger regards the reasoning in law as the unique methodology of modern legal forms.[173]

b. Unique professional criteria

To follow a logical train of thought, judges should have qualifications that include specific knowledge and skills pertaining to the essential conditions and important aspects of the legal practice. Therefore, high standards should be introduced and carried out. This would involve establishing a system that includes academic requirements and legal experience as the selection criteria needed for appointments and promotions. In relation to the academic criteria, it is important that a judge should have a profound legal background and the greater their legal knowledge the more likely that they would be appointed as senior judge in a higher court. According to former Chief Justice of the Supreme Court of the United States, Felix Frankfurter, the highly demanding accurate sense and super judgmental power needed by judges means that the greatest Justices were Hughes and Cardozo, for they were ideologists and were specialists in legal philosophy.[174] It is true that judges required to examine an issue related to the constitution, apart from the relevant academic knowledge, should also know something about Lord Acton and Maitland, Thucydides, Gibbon and Carlyle, Homeros, Dante, Shakespeare and Milton, Machiavelli, Montaigne, Rabelais, Plato, Bacon, Hume and Kant. Every aspect of the above knowledge may be useful for solving the issue in front of him.[175] Thus, it is clear that rigorous requirements are needed for the appointment of judges, particularly the most senior judges. Naturally, with different legal systems and different levels of courts, the standards of academic requirements are not the same. Generally, the academic

[173] Ibid.
[174] Henry J. Abraham, *Justices and Presidents, a Political History of Appointments to the Supreme Court* (1974).
[175] Ibid.

qualifications of judges in higher courts are better than those in lower courts.

Two issues need to be addressed when discussing legal practical experience. Firstly, a judge's experience should relate to the legal practice. In other words, when considering the appointment and promotion, it must first be determined whether the candidate has previous experience in a generalised legal field (including acting as a prosecutor, lawyer or legal academic person) and secondly how did this judge perform in this role. The former judge in the Supreme Court of Germany, Dr Foth, states in his academic report presented in China that to become a judge in Germany, you must first pass the national judicial exam, and then complete a two year legal internship. Once appointed as a judge, the quality of that judge's work would be very important for promotion; the director of the court would appraise your work on a regular basis to assess your achievement. Naturally, many other non-legal factors would also be considered, such as how the candidate gets along with the authority in politics and in thoughts.[176]

The second issue is that practical experience usually means extensive political participation; this is usually signified by the selection of the chief justice of Supreme Court and judges in higher courts. For example in the United States, until 1969 only 63 judges among 103 judges had already been working in the legal area, such as being judges or lawyers, prior to their appointments. Therefore, 40% of judges were actually appointed with no previous legal work experience.[177] This indicates that in the Supreme Court at least, legal experience is not a prerequisite of appointment. Nevertheless, excepting one judge, all of the judges of the Supreme Court of the United States have participated in political activities; they have at least had been working as a public servant in a government agency. Scholars have found that, excluding a very extreme case, judges in the Supreme Court are excellent; among all of the government agencies, you could hardly find a group of staff members who could compare with the judges of the Supreme Court, neither on capabilities nor on achievements.[178] This situation may also be the case in other countries, particularly in some developing countries.

Given the above analysis, it is necessary to determine certain criteria of qualification, particularly the bottom line. There is firstly the educational qualification. The common requirement is that candidates have a bachelor degree in Law; the United States and the United Kingdom even require a postgraduate degree, such as the Juries Doctor in the United States. Secondly, candidates should have broad working experience, such as in the judicial department or practice as a legal professional.

[176] Song Bing edited, *Reading: Judicial Systems and Judicial Procedure in America, Japan and Germany* (1998).
[177] Henry J. Abraham, *Justices and Presidents, a Political History of Appointments to the Supreme Court* (1974).
[178] Steven. J. Burton, *Introduction to Law and Legal Reasoning* (1995).

Most countries require candidates, particularly those applying for senior positions, to have had a relatively long-term service in a legal area. In many countries, especially those in the Continental Law System, this service could be judicial work or something similar. In countries of the Common Law System, the service does not necessarily have to be legal working experience; it could mean public service experience usually in the area of administrative management.[179]

c. The construction and operation of a professional training system.

Given that capability and achievements would be taken into account when selecting or promoting, the training in order to improve candidates' qualifications becomes very important. This training can be divided into two stages. The first stage involves being trained prior to their appointment. In other words, after they have finished studying and have gained certain degrees, they should be given training that focuses on those practical abilities necessary in the day-to-day work. The Legal Training and Research Institute in Japan, the Legal Training Institute in France and the internship system in Germany are ideal examples of this. Every year in Japan, roughly 700 graduates enter the Institute and study for 2 years. For the first 4 months they undergo basic training from instructors who are experienced judges, prosecutors or lawyers. The courses studied include case studies and the drafting of judgements using real cases. In the next 16 months they are given practice in local courts, prosecution departments and associations of legal practitioners and the instructors in these departments give the candidates' one-on-one training. For example, candidates could sit next to a judge and participate in a trial and be given the opportunity to observe and discuss issues with the judge. They may also be asked to assist in the drafting of a judgment. Following this the student would go back to the Institute for the final 4 months of their program. At the end of the study the candidate would sit for an exam and those who pass that exam can practice as a lawyer.[180] This sort of pre-training makes for excellent practitioners and provides a class of highly qualified and reliable legal specialists.

The second stage of the training is the continued education following appointment. From this kind of training, judges keep up with the latest information and updates, in order to continuously improve their abilities for current posts or to lay the foundation for higher positions. The advanced study system for judges in Germany and Australia, the Legal Training and Research Institute in Japan and the National Institute of Justice in the United States are examples of institutes that

[179] In fact, according to the introduction given by Diane Wood, judge of American Federal No. 7 Appeal Court, only 5 out of 8 judges have previous working experience in the legal area in his court. Song Bing edited, *Reading: Judicial Systems and Judicial Procedure in America, Japan and Germany* (1998).
[180] He Weifang, *Judicial Ideal and System* (1998).

promote the continued learning of legal practitioners. In the facilities mentioned, there are short term courses available to the judges, including research courses. For example, there is a researching meeting among judges organised by the legal training institute of Japan, and includes seminars on civil and criminal cases.

d. The judicial examination system becomes universal.

This would involve examinations being organised by the government and only those who pass can be considered qualified to practice in the legal profession. The examination systems in Germany and Japan are good examples of this. In Germany, those who wish to become a judge must attend two examinations. They sit for the first test when they graduate with a bachelor degree and if they pass the exam, they become student judges and start an internship that lasts for two years. During that period of time, students are asked to work in five different departments, including the civil court, the criminal court and prosecution office. After this, the students sit a second exam, which lasts for several days, and includes a written test and interview organised by a commission formed by legal professionals. Those who pass the second exam can be admitted into practice as legal professionals or may work in a legal department.[181]

In contrast, students in Japan only sit for one exam; however, this one exam is very difficult and has a very low pass rate. In order to become a lawyer in Japan, one has to pass the National Bar Examination, which is held annually by the Ministry of Justice. Usually 30,000 to 36,000 people apply for this examination and of these only 1,000 pass; the success rate, therefore, is roughly 3%. The average age of successful candidates is 27 years old, indicating that applicants study for the examination for four or five years after graduating. Those who pass the Bar examination then enter the Legal Training and Research Institute, run by the Supreme Court, where they receive two years of education in the practical skills and techniques of lawyers. After completion of the training, and following a final examination, about 15% of the students are appointed assistant judges and about 10% become public prosecutors; almost all of the people remaining register as attorneys.

Although there is no such exam in some countries there is usually another system operating with similar functions. For example, in the United States, law is one of the professions where the difference between prospective applicants and the successful is huge. The entrance exam for law school is one of the most difficult exams in the United States, meaning that law schools attract many excellent students. To some extent, the difficulty of this exam is not less than the German

[181] Song Bing edited, *Reading: Judicial Systems and Judicial Procedure in America, Japan and Germany* (1998).

exam.

e. The formation of ideology and a system of the professional community.

The professional community refers to a group of people who work under the same system and pursue similar values based on the legal profession. Accordingly judges, prosecutors and lawyers could be recognised as colleagues working in the same area as they have similar attitudes of value and background, use similar words, methods of demonstration and macro logics to discuss and deal with legal issues. This community and its way of functioning are recognised by relevant regulations. For example, lawyers, prosecutors and judges in the United States and Australia are all qualified to practice as lawyers, and they are allowed to communicate with experience. The community is divided into several categories, some of which may have subdivisions, and among these categories there are different interests or even confrontations, such as prosecutors between against defence lawyers in the court. It might be the case that the polarisation is so severe in the professional community that it is hard to believe there is a common community. However, there are still commonalities such as legal background, similar experience in the exam, professional training and ways of demonstration and logical thinking. The groups mentioned previously have very possibly already formed a so-called 'interpreting community', where members can communicate and constrain each other without obstacle, as we have observed that there are constraints and personal arbitrariness is regulated by the system. In addition, the formation of the community helps maintain the legal system's stability and independence, and gives it a neutral and just outlook.

We should move from this broad background to explore the feature of specialisation of the modern judicial system. As Max Weber pointed out modern society is characterised by rational governance which in its absolute form is rational governance with bureaucratic administrative officials. As he suggests, the form mentioned above is a kind of governance that pursues formalisation, which demands two requirements: ruling by law and emphasising specialisation, where the former is the basis for the latter. He points out further that the division, training and assessment of the profession are some of the important issues in this ruling format. The theory of rational governance of Weber could also be used to discuss the topic of the modern judicial system. To aspire after logos in the process of forming the modern society, the judiciary cannot avoid rationality that also stresses specialisation. Therefore, we are able to understand the frame of specialisation of the judicial system and its deep Significance.

3. The non-specialisation of the traditional judicial system

In the traditional judicial system, specialisation is not a common phenomenon. On the contrary, most of the courts have a strong non-specialised theme.

Firstly, legal persons lack a common ideology and relevant system. The formation of a professional community has a premise that there is a separation of functions and only when judges, prosecutors, lawyers and legal researchers act separately can the subject of a professional community be realistic. Many traditional countries have lacked this kind of division for a long time, and even if there is any, it is much undeveloped. In European history, from the end of Ancient Rome to the Nordic legal system in the 11th Century, including the Kingdom of Franks and Anglo-Saxon England, the legal systems were not separated from religion, morality, economics, politics or other regulations or customs. There was no difference between the substantive and procedural law. There were regulations, but these were promulgated by the King. Furthermore, as Berman states, the whole law and order system ran without professional judges, lawyers, and legal scholars. There were no law schools, no specialised books and no legal science.[182] As a result, there is no legal community at all. Despite a degree of separation of professions that came a bit later it did not necessarily form a professional community. In medieval Europe, although the first law schools were established in late 11th Century and scholars and theories were emerging, jurisdictions and legal systems coexisted and were mutually exclusive. The Canon existed together, and competed with, Secular Feudal Law, Manor Law, Commercial Law, Urban Law, and Royal Law, especially in the jurisdiction issue. It was the same situation between the feudal lords and the king. Because jurisdiction brought many benefits, the king and the feudal lords were pursuing that power.[183] Although the secular society had something in common with the church, the King and the feudal lords, they had different attitudes in interest and value. It is hard to imagine that they could form a community with the appointed judges. On the contrary, in some countries legal rights were hereditary and negotiable and therefore it was difficult for a professional community to be established.

Secondly, in the traditional society there was a lack of selection criteria and professional training. After the 11th Century, law was taught at the universities, legal theories were emerging and religious people began to research and announce religious regulations and theories and reached some achievements. However, in the whole of Europe, and all over the world, there were no universal selection criteria for appointing judges or any legal training until the onset of the modern society. If we admit that in the modern society professional background is a precondition for appointment and selection is exercised among those eligible candidates, then in traditional society,

[182] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).
[183] Baron de Montesquieu, *The Spirit of Law* (2002).

professional background was not a crucial element, and relationships were more important and selection depended on personal reliance and loyalties.

Thirdly, legal activities exercised by judges generally did not require unique knowledge or techniques in the traditional society. In other words, the method and standards used in solving problems were similar to those used in other government agencies, where the essence is the same. This is seen in the Ancient Greek Assembly (Ecclesia). It can also be seen in Hindu and Islamic law, where all social, economic, political and legal issues are handled by religion. The Koran is a religious masterpiece, indicating and regulating people's beliefs and moral attitudes, as well as the laws pertaining to all kinds of activities including legal issues exercised by the sovereign and the public.

Therefore, the understanding of the non-professional aspect of traditional society is only a point of view of the situation as a whole. Accordingly, our demarcation of the level of specialisation in the traditional and the modern judicial systems is also not absolute.

G. Conclusion

Overall we can summarise that there are six indexes in the judicial system: division, independence, reasoning, function, procedure and specialisation. We can set up a theoretical model under the dichotomy of the traditional and the modern judicial systems based on how the systems deal with the above indexes.

If we focus on the modern judicial system under this logic, it is not that hard to determine its internal mechanisms. Independence of the judicature is the key factor (which is also an important part of 'rule by law'); separation of responsibilities is a precondition; relatively stable regulations and rational procedures are both constraints and protections; professional judges are the leading actors, and efficiency is the ultimate goal.

Of course, no judiciary displays all of the qualities or traits addressed here in the pure, complete or exclusive form. Even the most modern judicial system retains some pre-modern or traditional elements

CHAPTER 4: THE DETERMINANTS OF THE PATHWAY OF JUDICIAL MODERNISATION

In the previous chapter, the differences between a modern and a traditional judicial system were explored and, therefore, it is now important to look at the relationship between the two. Which one came first? Was one the replacement of the other hand, if so, what were the circumstances surrounding this occurrence?

To fully answer the above questions, we need to look at the background behind these two systems and examine the theory of modernisation and its relevant historical progress. The modernisation of the judicial system was the inevitable outcome of this modernising process.

Modernisation is the most severe and far-reaching radical change process so far in the history of human beings. The outcomes of this process are extensive: strengthening of relations between nations due to the changes in the international environment; large growth in non-agricultural productions, particularly in the manufacturing and service industries; decrease in birth and death rates; continuous economic growth; fairer distribution of income; birth of new organisations and technologies; a bureaucrat class separated from a lower class; increase in popular participation in politics. These transformations have already occurred in many countries. Additionally, modernisation has the potential to affect all of the different nationalities living in the modernised country, thus destroying established social modes. Therefore, the effects of modernisation are comprehensive and lead to a more reasonable, open and clear legal system. Introducing a judicial system, that is in tune with the requirements of a modern society, and breaks away from traditional methods, is imperative.

From an investigation of historical records and research conducted in the area, we can see the universal phenomenon of human societies developing from agricultural societies ruled by man to commercial societies ruled by the law. Norbert Elias[184] noted that there is no set rule for social development; however, the process can be divided into several stages that tend to follow a certain direction. Social order initially formed due to the mutual dependence between people, and this determines the course of history and became the basis for civilisation. Although the process is not a straight line and an accurate picture of the path of social development is difficult to draw, there is a main direction that can be speculated. In order to speculate this path, however, it is necessary to

[184] Norbert Elias, *The Civilising Process* (2000).

filter through a huge amount of historical records and research. Elias describes roughly the initiative of interlacing social relationships from the medieval to the modern civilisation, which belong uniquely to the formation of a nation. For instance, the transition from a natural economy with a lower level of division in labour to the current economy with higher level of division in labour; the increasing level of social separation and the springing up of civil class.[185] Using jargon from contemporary social science, the progress is a transition from the agricultural civilisation, ruled by man to the commercial civilisation, ruled by the law.

As the superstructure that solves social disputes and maintains economic and social order, the judicial system must be modernised to accommodate to the new economic and political needs of the people. Therefore, generally the traditional judicial system exists in an agricultural and rule-by-man society, whereas the modern system is found in more commercialised societies and those ruled by the law. The transition of the judicial system from the traditional to the modern accordingly follows the progress of history. The former is a spectacular chapter and crucial stage of the latter, where the latter provides a macro historical and social background to the former.

A. Evidence from philosophic anthropology on the modernisation of the judicial system

Philosophic anthropology believes there is a consistency in human needs, which means that when major social issues are discussed, the unity of human thoughts should be considered. This is also the case in the court system.

The modernisation of the judicial system is a result of the gradually increasing awareness of human rights and the interaction among people with increasing capacity for rational recognition. The need to protect human rights could be regarded as the common instinct of people. Dworkin suggests that legal and political rights introduced in the West are reactions to certain issues and concerns and they do not, therefore, belong solely to the West.[186] China would not refuse to employ those theories simply because the West established them first. No matter which cultural tradition you belong to, 'human nature' means that all people have similar social needs, demands and wishes. We must believe in the strength of the omnipresent human nature and the power of dignity and value. There is no doubt that there is no comparison between human nature and animalism, and human dignity and values can only be displayed and protected by social justice. However, social justice is usually only the bottom line of moral principles in every epoch and every civilisation. The basic characters

[185] Ibid.
[186] Ronald Dworkin, *Political Judge and the Rule of law, A Matter of Principles* (1985).

and relevant moral values that form the basis of human rights are regarded as being substantially changeless. It is only when human nature and history are recognised as the basis of human rights that the development of human rights can begin. The Vienna Declaration and Program of Action adopted by the Second World Conference on Human Rights in 1993 states that all human rights derive from the original dignity and values and people are at the center of human rights and freedom. As the major beneficiary of these rights and freedoms, people should participate in this actively. China also identified the fulfillment of human rights as its basic target in the Fifty Years of Progress in China's Human Rights released in 2000. This also stated that the strategy of development according to the 'Three Steps' after the reforms would revolve around the improvement of human rights.

Although every country in the world has different approaches and systems in their courts, the overriding principle behind a modern court system is that it must protect the rights of the people and take full responsibility for this role. Thomas Fleiner stated that it would be naive to authorise government agencies to look after the human rights. Ultimately, only the courts and ombudsmen can ensure that the parliament, government and the administrative agencies do not abuse their powers. This allows the courts to serve not just the wealthy and fortunate people in society, but also minority groups and those unable to defend themselves.[187] Unger observes that rights are a series of procedures established to solve disputes, rather than a set of special arrangements for society.[188] In fact, the Separation of Powers and Constraints, advocated by the Enlightenment in modern times, pursue the fulfillment of human rights by using an independent and neutral judicial power to constrain the legislative and the administrative and to avoid abuses of power. These have been well-accepted by the public in modern society and have been put into practice. In the modern world, where the administrative and the legislative powers are extensive, people are becoming much more aware of the importance of a modern court system for the protection of human rights.

The universality of the modernisation of the judicial system is determined by the demands of being alert to the wickedness of human nature. Research in psychology and human society has shown that human nature is not definitely perfect nor is it totally wicked; there are good and bad parts to the human nature and these cannot be separated. Engles suggested that the fact of the evolution of the human proves that animalism cannot be separated from human nature and, therefore, the issue is the difference between humanity and animalism and how much of the animalism part can we get rid of. People can be divided into two entirely different types: the humanist and the animalist; the good and

[187] Thomas Fleiner, *What Are Human Rights?* (1999).
[188] Roberto M. Unger, *Law in Modern Society* (1976).

the evil; a sheep and a goat. This kind of division can only be found in Christianity except the Realistic Philosophy.[189] Thus, human nature is not reliable and people, including the authorities, have the instinct to judge according to his or her emotions, desires, requests and impulses. As a result, powers are perishable and could be used against justice if individuals manipulate them. Many countries have representatives that show this perishable power: the gold tub owned by Ceausescu (the former president of Romania); the garden of anthropophagous lions owned by the King of Middle Africa; former President of Philippines, Ferdinand Marcos' luxury resort that was large enough to raise animals.[190] In China, the former Vice Governor of Jiangxi Province, Hu Changqing, was named the 'hoodlum politician' for his greed towards property and beauties and was sentenced to death by firing squad; the former Vice Chairman of the PCSC Cheng Kejie was sentenced to death after receiving bribes. Most of the above senior officials like Ceausescu, who were tried by law due to an abuse of power, were ruined by being born into a simple family and finally being able to step into a position of authority. The sense of power felt from positions of authority can often change a person's personality and nature. In reality, however, all kings, presidents and leaders are no more special than those without such power, nor do they deserve more praise. People in positions of power have the same propensity to evil as any other person; however the damage they can do is much larger. Acting on the 'bad' side to their human nature has the potential to bring great harm to society.[191]

In order to avoid corruption and the abuse of power, a system of Checks and balances should be introduced during the construction of political structure. Federalists believe that implementing measures to control the defects of a government is a kind of disgrace to the human nature; however, it would be a much worse situation if the government itself was a disgrace to the human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. [192] In fact, since Ancient Greece, people started to attempt building a system of power's checks and balance; following this, people have never stopped to attempt to construct the system of checks and balance all over the world. Of course a scientific

[189] The Translation and Edit Bureau of the Contral Comittee of the CCP: Marx & Engels, *Selection of Marx and Engels* (1975) vol 3, 140.
[190] Zhou Bing, *Trial Presidents* (1998).
[191] Zhou Bing, *Trial Presidents* (1998).
[192] James Madison, The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments. Alexander Hamilton, John Jay & James Madison, *The Federalist, A Commentary on the Constitution of the United States* (1980), No.51.

system of checks and balance of power was formed gradually when the Enlightenment had been introduced to the Western political practice, and the modern judicial system is just about one of major brackets to the system. This judicial system not only constrains the wickedness of involved parties and umpires by exercising just procedures, but also prevents from the abuse of power from governmental agencies and officials by exercising its functions as authorised by the separation of powers.

B. Background of the judicial transformation relates to the economy, democracy and the rule of law

The above analysis indicates that the background to modernisation had a broad effect on the progress of the modern judicial system. However, it is important to research further to determine why and how the traditional judicial system becomes the modern one, and how the outlook of modern judicial system does come into being. The three basic aims of modernisation, democratic politics, a nation ruled by law and a market-oriented economy, are also common requirements for the transformation into a modern judicial system.

1. A modern judicial system is a certain outcome of a modern market economy

A modern judiciary is part of the institutional framework for a free market economic system. Before the market-oriented economy was introduced, most of the activities in the market were unreasonable; people couldn't estimate the cost of goods or incomes accurately. Under these conditions, the legal system was a kind of unreasonable institution; judges drew conclusions from general social opinion and their own personal understanding of customs and personal knowledge. This meant that, in a professional regard, judges were similar to other social order guards. The main concern of the judges was resolving a certain case rather than making society more reasonable; as such, little attention was paid to developing a legal system through common and formalistic logic. The kind of legal and judicial system that existed in these times was there for the quick success, instant benefits and had no part in a long-term plan for the economy. The introduction and development of the market-oriented economy has slowly amended this situation.

The modern market economy is not only a 'model of economy', but also a system that relates to the whole structure of society, including cultural and legal systems. Looking from the angle of development, the economy and the 1aw are inseparable. The economy is the basis for the formation and the development of the law, and additionally, the law reacts to the economy. 'In each historical

time, the economic production and the social structure resulting from it are the basis of the political and spiritual development of that time.'[193] The politics, the law and other spiritual products that are developed from an economic base are referred to as the superstructure; once this comes into being, it will react upon and serve the needs of the economy.

Generally speaking, there are three main economic models: the natural economy, the product economy and the market economy. Similarly, there are also three different types of legal system.

A natural economy is a closed, self-sufficient economy based on agriculture. The family, the plantation and the village are the main units of social production. People are both producers and consumers of their own products. The levels of division of labour and the levels of specialisation are very low; the links between economic organisations are weak. People live in a narrow, closed society. As a result, the norms regulating social relations are based mainly on the patriarchal system as are the laws of this society. Therefore, the laws tend to be arbitrary, hierarchical and involve cruel methods of punishment, which are used to maintain the dependency of producers to the economically-dominant class.

A product economy, also called a planned economy, occurs when the production and distribution of products are directed by a state plan. Under the product economy, the level of industrial and agricultural developments is higher than under the natural economy, although the general level of development is still relatively low. The product economy emerged in the former Soviet Union and other eastern European socialist countries. China also adopted this economic mode in 1949. This system's model was based on the collectivisation of agriculture, the nationalisation of private industrial and commercial enterprises, the development of state-owned economy and the implementation of a highly centralised system of production and distribution. The original intentions of the designers of this system were probably good, but in practice, they had ignored the objective conditions for development. As a result, the politics and the economy are combined and the economy becomes the handmaiden to politics. Under this economic model, private law, which regulates the horizontal economic relations among people, is negated and administrative orders, regulations and instructions, designed for the implementation of the top-to-bottom economic plan and distribution system, are highly developed. Under these conditions, it is not only impossible to develop a system of 'the rule of law', but even a simple legal system was considered a hindrance. As a result, a situation of outright 'rule of man' emerged in these socialist countries, including

[193] The Translation and Edit Bureau of the Contral Comittee of the CCP: Marx & Engels, *Selected Works of Marx and Engels* (1975) vol 1, 232.

China.

Under the market economy, the allocation of capital, labour and other resources, and the distribution of products are regulated entirely by the market. While the state plays a role in regulating and directing this market it no long has the dominant position in the economy. It is generally agreed that the market economy is 'the midwife' of the rule of law; however, people have different opinions as to how and why this became the case. To some extent, these differences in opinion reflect the different understandings of the rule of law and the preference for different models of the rule of law and the modern judicial system. For example, Max Weber believes the reason for the market economy's ability to create a rule of law society is that its market activities require predictability and calculability.[194] I believe it is largely because the market economy creates a far greater demand for laws and a modern judicial system, both in terms of quality and quantity, than the natural or product economies.

Firstly, the modern market economy is an exchange economy; those who enter into the market must be able to sell their products or labour freely. This requires people to have more personal freedom than they do under the natural or product economy. Under the natural economy, this kind of freedom is impossible for the majority of people. In a product economy, although the constitution and the law have provided for such freedom, most people are tied to a certain area (in the case of peasants), a certain enterprise (in the case of workers or employees) or a certain system (in the case of state personnel), and so their freedom is greatly restricted. A modem market economy demands that people have independent personalities, and their freedom be truly guaranteed and realised.

Secondly, those who enter into the market should not only have the freedom to exchange with other people, but also have something to exchange. In other words, they must have ownership and the right to dispose of their products, as well as clearly defined property rights and the legal status as subjects of the market.

Thirdly, the realisation of the exchange and the healthy operation of a market economy depend on good contractual and credit relationships. These relations must be guaranteed by a complete set of laws and obligations.

Fourthly, the market economy uses benefit as its main consideration. Investors must be concerned with the economic results from his/her capital and with the application of new scientific and

[194] Max Weber, *Economic and Society* (1978).

technological developments. This will inevitably result in fierce competition within the whole economic operation. In a time of high technological advancement coupled with complicated social conditions, relevant laws are necessary to ensure that competition in various fields is fair and free from the influences of blood ties or nepotism. These laws are also necessary to avoid an economic collapse caused by a monopoly of power and economy.

Fifth, while competition promotes development and enhances efficiency, it also means that only the fittest will survive. In order to ensure sustainable social development and to create a favourable and stable environment for development, a complete social security law is necessary. This will also provide the losers of competition and various vulnerable groups in society with an effective social security system.

Sixth, in the process of fierce competition and the pursuit of maximum benefit, various actors in the market not only engage in a struggle against each other, but will also not hesitate to jeopardise the interests of the state and society. This attitude will inevitably lead to conflicts of interest. These are called externalities in economic theory. In order to control these conflicts and prevent them from intensifying, the state must regulate the conduct of the subjects of the market, make fair judgments on the claims of various parties of the conflicts and gradually establish a legal order suitable for the development of a market economy.

Seventh, replacing a planned economy with a market economy does not mean that society no longer needs any planning. 'Planning and the market are both economic methods'[195]. In order to avoid the negative effects of the blindness of free competition in the market economy and to avoid the huge waste of social labour and resources as well as the social instability resulting from these negative effects, the state must conduct macro-economic control and carry out necessary planned intervention. Therefore, it must adopt laws for the macro-control of the market.

Finally, the development of a market economy requires not only civil, economic and administrative laws that directly regulate the market, but also laws that safeguard the fundamental rights of the citizens, regulate the conduct of the government, maintain social order and protect the environment and natural resources. These laws are necessary for the creation of favourable external conditions and social environment for the operation of the market economy and to ensure stable and sustainable economic development.

[195] Deng Xiaoping, Excerpts from Talks Given in Wuchang, Shenzhen, Zuhai and Shanghai, *Selected Works of Deng Xiaoping* (2002) vol 3, 375.

The development of a market economy in any country will inevitably be based on the conditions of that country. It will strengthen the ties between the domestic and international market and gradually achieve unification and globalisation of the world economy. This not only means that all countries must abide by a common set of international economic rules, but also demands that each country's laws in the political and cultural arenas are compatible with international standards. These are the external conditions behind the establishment of a market economy and the modern judicial system, as well as the driving force for social development in each country.

In summary, the modern market economy, the rule of law and the modern judicial system are indispensable components of modernisation; they reciprocate each other, they are interdependent of each other and engage in interplay with each other. They have gradually taken form and established during the development of human society.

2. The modern judicial system is an inevitable result of democracy

The most important aim of modern democratic politics is to prevent the abuse of state power and the violation of human rights. Therefore, the judicial function has changed completely from simply explaining the law and punishing the criminals to having an impact on broad social and political relations. The influence of these on the judicial system's development from the traditional model to the modern comes in two aspects.

Firstly, the court is not only to punish the offences of citizens, but also to crack down on governmental officers who exceed their authority. A general view in democratic countries is that a democratic institution not only requires a group of people to be referees between individuals, but also to be referees between governmental powers and individual rights; the judiciary plays this role.

Secondly, the court should be a kind of pendulum. Modern democratic politics can be regarded as a delicate machine that only runs with the cooperation of all its parts; the judicial system is a crucial part of this machine. In a democratic society, a modern judicial system supervises and confines other government departments efficiently. For example, some countries state that the Supreme Court should be able to use articles in the constitution to maintain, limit and even change the balance of power between the central and local governments, or between the leader and the parliament. Furthermore, the judiciary is also requested to become a political system to maintain the balance of benefits between the majority and the minority. Democratic policy indicates that we should not just follow the opinion of the majority, but protect the rights of the minority or any

individual, in order to avoid a tyrannical government run by the majority. However, this purpose cannot be achieved by any legislative department or administrative organisation, because obeying the majority is a principle of the legislative department and the responsibility of the administrative is to carry out the decision of legislations. As a result, only a court system can take on the responsibility to protect every member of society. True democracy is much more than just what the majority thinks, it must also protect the rights of the minority. This theory does not only regard judicial examination as a method but also a way to confine the majority's greed and changeable eager.[196] As we can see, modernised democratic politics requires the judicial system to take the responsibility with a whole new look, so that any change of that system is imperative under the situation.

For the transition to a modern society to be realised, the separation of governmental powers and appropriate checks and balances, must be emphasised. As Montesquieu observed, if judicial and legislative rights become one, with the power to exert arbitrary pressure upon people's life and liberty, judges become the lawmakers. If judicial and administrative rights become one, then judges obtain the power to oppress.[197]

In order to bring the effects of jurisdiction into play, it must be given independence, meaning a separation from other powers. Therefore, legal activities should be separate from politics, to ensure judges are not affected by any other powers thereby preventing possible abuses of power. Additionally, independence is an important factor when the judicial system is given the power to supervise and confine other government organisations.

In addition, the concept of procedure and its system also comes directly from democratic politics. The meaning of democratic politics in this regard is a kind of procedural politics; it must act in accordance with the procedure of definition, transparence, embodiment and justice; this includes the essential elements of modern politics, such as election, legislation, and jurisdiction. It would be necessary for activities of jurisdiction to follow the procedure.

3. Transition to a modern judicial system is related to the construction of a nation ruled by the law

The ways of being ruled by the law can be discussed in accordance the research of political and legal philosophers.

[196] Roger Hilsman, (1985).
[197] Baron de Montesquieu, *The Spirit of Law* (2002).

Firstly, the rule of law is often contrasted to the rule of man. In this sense, according to Dicey, the rule of law contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary power of constraint.[198] Therefore, this understanding of the rule of law seems to require adhering to something very much like Lon Fuller's internal morality of the law where the defining characteristics of legal rule are generality, publicity, exclusion of retroaction legislation, clarity, stability, exclusion of legislation requiring the impossible, congruence of official action and declared rule.[199]

Dicey also pointed out that rule by law has a less formal and more substantive sense: the protection of personal freedom.[200] Ronald Dworkin stressed that this substantive aspect of the rule of law relates to the system's concept of rights. He stated that the rule of law assumes that citizens have moral rights and duties towards one another, and political rights against the state as a whole. It insists that these moral and political rights are recognised by positive laws, so that they may be enforced upon the demand of individual citizen through the courts or other judicial institutions, as far as this practical. The rule of law in this regard is the ideal of rule by an accurate public conception of individual rights.[201]

Dworkin also believed that the ideal of the rule of law not only requires that the government rule though law, but also that the law rules government; the courts should enforce rights against the state as a whole. This is one way in which the rule of law requires an independent judiciary. If citizens are to enforce their legal rights against the government, the judiciary cannot be an instrument of the executive or the legislature.[202] This aspect of the rule of law also points to a tie between constitutionalism and the rule of law, insofar as that a constitution is viewed as articulating a fundamental law that limits the authority of the legislature itself.[203]

The reason I cite the above opinions is that the rule of law is clearly related to the judicial system. For governments to be ruled by law there needs to be an independent judiciary and some form of judicial review. Consequently, it affects the elements of modern judicial system directly and indirectly.

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[198] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1948).
[199] Lon Fuller, *The Morality of Law* (1964). John Rawls, *A theory of Justice* (1971).
[200] Dicey mentioned the distinction between Britain where the constitution was founded on personal freedom which enforced through the common law and those countries that protected freedom through the constitution. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1948).
[201] Ronald Dworkin, Political Judge and the Rule of law, *A Matter of Principles* (1985).
[202] J.R. Lucas, *The Principles of Politics* (1966). This also relates to Madison's argument in Federalist 47, *The Federalist Papers* (1961).
[203] Hamilton, Federalist 78, *The Federalist Papers* (1961).

What is the relationship between ruling by law and the transition of the judicial system? One of the essential aspects of countries ruled by law is the existence of multiple-interest groups. One of the main responsibilities of the government in a modern country is combining the interests of these groups and acting as a compositive group. Therefore, the modern judicial system must follow procedure rather than customs and the milk of human kindness to deal with social conflicts and ease tensions in the liberal society. The modern society is a kind of object that has many difficulties but is maintained reluctantly, due to the law and the judicial system playing such an important role. The mainstream opinion in modern society is that courts act as a center for law enforcement; they take responsibility for harmonising interests and maintaining society. There is no doubt that the modern judicial system is able to solve disputes in an extensive range of areas and is thus able to maintain social order and avoid abuses of power.

Furthermore, it should be noted that the uniqueness of verdicts is related directly to the intentions of a government ruling by law. In this regard, any activities of the government should be guarded by regulations. It does not matter whether these regulations were made by historical succession or by reasonable legislation, they need to be agreed or permitted by the people. Viewing activities according to the law is a reflection of the value of natural law mentioned by many jurists, and is also the essence of modern democratic politics. As a result, judgment according to law is an integral part of the modern judicial system. It can not only be seen in the tradition of statute law in the civil law system, but also in the case law of the common law system. Additionally, all the judges in the continental or the common law system must interpret the regulations or even create new regulations, while still abiding by the cardinal principles of legislations and precedents. All of the judges' activities must be within a certain range, declared in the constitutional law, and seldom does the judge have legislative authority of their own.

C. The concrete process and universality of judicial modernisation

The basic indicators of a socially modernised society are: market economy, political democracy, pluralised culture, social relations are contracted and the country is ruled by the law. As a background resource, those essential elements is not only to must be relied by the judiciary transformation from traditional model to the modern, and also qualify the progress of modernisation of judicial system.

However, the actual pathway of innovation in judicial modernisation is different in every country. Despite the fact that certain innovations in one nation may be viewed as being superior to another,

we cannot simply criticise the progress of judicial modernisation in that particular country. Hence, when discussing the reasons for different judicial innovations in different nations, it is important to look at the freedom of choice.

1. Freedom of choice: a bridge that spans the background and the pathway

Choice is a very important word in social life. In the political philosophy area, it plays an essential role in the development of a liberal society. Choice means an individual is willing and unconfined to choose from a range of options. In the economical area, choice means freedom to trade in the free market. Generally speaking, choice is to select an appropriate means in accordance with a certain purpose.

In the certain range that relates to this paper, choice has a very strong connection to the theory of modernisation; the most basic index of modernisation is choice.[204] In practice, modernisation begins in the non-economic area, where a culture shows to study and question people's attitude who did moral (or normative), social (or structural), individual (or behaviour) selection. For modern people, choice is the center. We could go further and say that political institutional arrangements, including the judicial system, becomes the selected system for a certain collective and in contemporary society, the government plays the role of the mechanism for adjusting choice.

It is reasonable that different countries select different methods to modernise their court system. It is very common that each country selects the modern legal system as the premise and then evaluates the system according to its situation. In my opinion, the progress of the modernisation of the court system is the process where a country examines and distinguishes the most suitable system and is also the process of improvement in the judicial system. Different countries have experienced different pathways for judicial modernisation that illustrate the importance of 'choice'. Every country that has made the choice to modernise must find a system that is in accordance with their modern social functions under the existing institutional situations, and consider how to form the structure for judicial modernisation using a set of procedural conditions to ensure a reasonable choice. Some countries choose the external, radical mode of transformation and others might choose the internal, 'step by step' mode to establish their modernised court system.

2. Essential pathways: step by step or radical

[204] Claude E. Welch edited, Political Modernisation, *A Reader in Comparative Political Change* (1967).

There are two basic, worldwide pathways to modernisation. One is modernisation from within, or endogenous change. This means that the motives for social modernisation come from society's own dynamics. The other model is modernisation from without, or exogenous change. This refers to the society that is impacted by outside influences causing internal, economic and political revolution.

The step by step or gradual progress is usually seen in European countries, such as the United Kingdom, France and also in the United States of America. In these countries, the transition of the judicial system from the traditional to the modern was generated by internal elements such as politics, the economy, culture and society. The process was also a gradual one that lasted for a long period of time. The reason for the lengthy progress is that all of the elements causing the change mature gradually and impact on the judicial system gradually. In Britain, for example, the 'step by step' progress is quite obvious. Prior to William taking control of the British government in 1066, there was no separation of powers in the government; the King and his parliament had the power of jurisdiction, administration and legislation. Although the three royal courts, court of treasury, court of common law and court of the King, were divided from the parliament, they were controlled by the King or were established for the interests of the royal family. For example, Henry II of the Kingdom of Anne woke up early every morning and went through the cases with his secretary; he liked judges not to always say yes to him and liked to hear cases everywhere in the country. Nevertheless, he regarded himself as a lawmaker. He would re-estimate and re-arrange existing laws as he saw necessary,[205] and he, therefore, held the central judicial power in his hand and was able to intervene with local jurisdiction. The modernisation of the British court system started when the judicial power was separated from the central government and state powers were centralised. The powers were separated, the courts were established in the royal family and then gradually concentrated on solving disputes. Before Henry II's reign, there was no regular court to bring specialised and formal household trials. Jurisdiction, particularly local judicial powers, was controlled by the dignitary. Once in power, Henry II gave the central government more power, which led to the establishment of centralised royal courts. The courts mentioned above fall into this category. Although the courts were still under the control of the king, he only used his power when a dignitary was involved or when it was an important case. With the development of the society, the courts gradually began to narrow their duties to just settling disputes; other organisations were gradually limited in, or stripped of, their power to trial. As the common law system gradually took shape, the judges in the royal courts would take the precedent as principle when hearing trial, and thus the common law was formed. Nevertheless, the connection of legal work and existing trial required judges to have professional knowledge and so the profession of legal work has grown

[205] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

without being noticed. The four famous law schools in London, which specialise in training legal workers, are symbols of the progress of the specialisation of legal workers. Similarly, the system of procedure was developing with the development of court system, the principles of which were established and developed gradually by the royal judges hearing practice. As for the independence of jurisdiction, this was created in the Law of Succession of the Crown by the struggle between judges and the King, and especially the debate between Kirk and King James I. However, judicial powers, particularly the power to confine administrative authority, only begun to be developed at the end of the 20th century and have continued their growth in the early stages of the current century.

The French system differs slightly to the British. Before the great revolution, all courts, including the royal court, were not controlled by the king; rather, they were against the king. Although there was a level of division in judicial functions and a small amount of independence, the courts contained almost no professional element and the position of judge was for sale. Modernised substantial law and procedural law had not been settled or developed; the function of jurisdiction was to struggle instead of to confine as it is in the modern meaning. After the great revolution, jurisdiction was separated from the parliament and administrative organisations and the courts became independent. However, there were many confines on jurisdiction's supervision of the legislative and administrative, because of King Louis XIV and the courts struggling for their own benefits and disregarding the interests of the people. Thus, the principle that it is the judge's responsibility to resolve disputes in accordance with the statutes was established. There are both pros and cons of French jurisdiction, for example, the function to confine is still limited.[206] In summary, the modernisation of the French judicial system was the 'step by step' method, according to its structure, nationalisation and diversification.

The judicial system of the United States of America is similar to the British but it is also different in many ways. The biggest difference is that the courts obtained the power to confine and can launch examinations on cases that are suspected violations of the constitution. The doctrine of judicial initiatives was created out and the courts were widely involved in making public policies, which were the specific duties of the legislative and administrative departments. This became a mode to be followed by other countries with a continental legal system that did not have this kind of confining function. For example, Germany set up a constitutional court after World War II, as did France and both the Supreme Court of Japan and the Australian High Court have the power to examine

[206] This has been greatly improved by the establishment of the administrative court. But the initial motive to establish the court was to prevent the court system interfering with administrative organisations.

violations to the constitution.

In contrast to the three countries mentioned, the transformation of the Japanese judicial system was influenced by external pressures. The Japanese government had to reform after several attacks from western conquerors in order to retvive their strength. The earlier and more complete changes were to construct a mature modern legal system and to establish specialised courts, which had professional judicial workers as the judges and officers. The independence of jurisdiction and the multiform judicial functions were established later. Until the end of World War II, the independence of jurisdiction was still not a reality in Japan. The main responsibility of the judiciary was to maintain the social order and was full of violent elements. After Japan was conquered by the U.S.A. this situation changed, however, the power to be independent was still relatively limited and the function to examine violations to the constitution exists only in name nowadays.

When comparing the above two modes of transition, the 'step by step' approach seems more successful and natural; the radical approach is usually much more winding. The opinion of Hayek in his book *Constitution of Liberty* [207] explains this point of view. He states that there are two kinds of opinion and choice during the development of human society, which is the 'step by step' sense and the creative sense. The gradual one comes from nature, is long-term and is brought out by internal elements in the society. There are a lot of tests and adjustments during the procedure and it ends in a reasonable way. This method cannot be changed or controlled by human beings, and it is barely even understood by humans. It involves taking advantage of an opportunity to determine what is the best attitude and modus operandi for society's development. In contrast, the creative sense is where people believe in the man-made process, which is based on the adequacy of human rationalities, think that basing on the rationality of human being is enough to know all the details of the construction of social system according to the values of social members. In reality, all social systems are generated by society itself or man-made, the former is a kind of order generated naturally and the latter is the order brought about by man. However, the order generated by society itself is the most vital one, whereas the man-made one cannot last for a long time. Hayek also notes that the law is a kind of spontaneous order. This constructive opinion inspires us to comprehend what pathway is best for judicial reform, the reasons for which follow.

Firstly, the real vitality of the judicial system is its ability to establish and maintain a certain level of predictability; this should be a kind of power that brings innovation gradually to the society, rather than rapidly. Therefore, the judicial system should be regarded as a formal system that can be

[207] F. A. Hayek, *The Constitution of Liberty* (1978).

informed in advance and is able to maintain the social order. Otherwise, under the rapid changing of the judicial system, there might be wide-reaching and long-term turbulence in the society. This would result in the existing balance of legal psychology being broken and the original social order would be destroyed as well. Although a the court system that undergoes strong pressures can bring benefits to the long-term development of a society, this system may not be accepted by the people due to a lack of efficacious proof and therefore it may not be maintained after a certain period.

Second, internal and gradual innovation admits the limits of rationality and incompleteness of knowledge. The government cannot be expected to know everything and therefore it cannot achieve the perfect outcome the first time using 'programs' to innovate the judicial system. Because of this, it must be recognized that the limitation of the designer of the judicial system and admitted that the natural order comes into being during the running of the judicial system itself, and confirmed that the rationality of the internal 'day by day' innovation. In this context, the innovation of the judicial system should be internal, because this kind of change is not just to transplant a new system, but should also be supplemented with new local knowledge that has been changed continually. In detail, the judicial system that suits a country is related to an architectonic knowledge, which has vitality, is up-to-date and can run the legal system properly; rather than a system of abstract regulation without any background.

Compared with the above, the external and radical or 'under pressure' innovation is intense and efficacious, however it is doomed to be very difficult to succeed, because it is a kind of transition that is 'pushed by the government', who is in turn under many kinds of social pressures, including foreign force. As a result, no matter how innocent the elite are when bringing the innovation, the outcome would still be a tendency to strengthen the authority of law, which would sharpen the internal contradictions of the existing legal system. It was pointed out by Unger, when he compared the history of the modern legal system and social development of Germany, that a country ruled by law is a denotation of compromise between the sovereign power and the order of forming an association in the civil society.[208] In fact, if the order of association in a civil society has not been grown up to the certain level which could be enough equilibrium of orders between the compulsive state power and the civil association, the rule of law would hardly been generated de facto even there is the rule of law de jure. The modernisation of the Japanese legal system could be used as an example. Although the modernisation was carried out by the social innovation of democracy, the object of innovation was not the law but the manner of people's behaviour. However, we must point out that this kind of revolution brought about by the government, from the central to the local,

[208] Roberto M. Unger, *Law in Modern Society* (1976).

might also bring the so-called 'developing administration' sickness. The question is how long this kind of system will last and retain its vitality, because it is far from what the people want, and it also lacks the recognition among the people that other, more reasonable, systems receive. In this regard, the opinion of scholars' may help: the acceptance by the public rather than a legal organisation is the crucial element in carrying out the law.[209] So the external and radical innovation of the judicial system has its limitations to success. No matter how great the external and radical innovations, if it does not change to the internal and gradual form, so that the innovations can be seen as suitable to the public and respond quickly to social requirements, the innovations will die or break.

3. The universality of judicial modernisation

As Francis Fukuyama states, although to become a supporter of the theory of modernisation is no longer 'politically correct', the theory itself has survived the test of time, and Asia is proof of this. The postwar modernisation theory relates that political democratisation and the following political liberalisation are results of the development of a nation's economy.[210] There are two aspects to this argument. Firstly, as we know, the power to produce is the main motive of social development. Hence, we have the theory of borrowing institutional forms from the West and using them in the traditional Chinese system. This theory argues that China should get rid of its traditional pride in the old system. Objectively, we can admit that after all the social production and its approaches in modern societies, western countries represent the highest level of economic development and to some extent, they also represent universal achievement.

Secondly, if the above statement is correct, then according to the general philosophic principles of Marxism, which state that the economy is the basis of the superstructure, a highly-developed, market economy ruled by man cannot coexist with an autocratic government and a traditional judicial system. Thus, since society is an organic structural system, a developed market economy demands a country ruled by the law with a similar structure, as well as democratic politics and a modern judicial system.

I do not think that the modern judicial system is a patent of western countries, although the overall construction of the modern judicial system is closer in practice to some of the developed countries. The constructional model of modern judicial system in this study is not exactly the same to the specific judicial system in western countries; the one I have talked is a kind of abstraction derived

[209] Bernard Schwartz, *Statutory History of the United States* (1970).
[210] Wu Dongsheng Edited, *Difficulties and Outlets of Eastern Asian Modernisation* (1980) 46.

from all kinds of complicated western systems; peeling, extracting and purifying what I have found. This study therefore gains an ideal 'pure object', which is mainly a tool for analyzing. Accordingly under this circumstance, I would better say that the practice of the modern judicial system in western developed countries in the past is only a kind of evidence, which using their own specific experience to prove the universality of the development of judicial system in human history.[211] Furthermore, I thought that 'the model of the west' could be regarded to belong to the west mere in the historical meaning, but it is belonging to the world in the sociological meaning.

Additionally, Sorokin states in his masterpiece, *Social and Cultural Dynamics,* that there are two basic forms of culture in human society, the sensate culture and ideational culture.[212] In the former, human institutions and symbolic expressions are essentially designed to meet the needs of sensory organs. The chief principles are that these should visualised, recognised and felt; science is a crucial part of the culture. The latter, on the other hand, relies on faith. It is abstractive and is based on the non-experimental or the ultra-experimental; religion is its crucial aspect. This kind of division in cultures can assist us in our discussion. We believe that the judicial system is the crucial institution of the sensate culture, where experiences can be used as references. Additionally, as proved above, the progress of the modernisation of the judicial system is universal and depends on the unity of human nature, as proved through philosophic anthropology. However, when dividing the judicial system into the traditional and the modern and viewing the modern system as the goal of modernisation, this division will most likely incur the criticism of some scholars for being a simplified theory of development via a linear route.

My response to such criticism is that, as a method of analysing differing from the sociological optimism of classical evolutionism and its insistence on continuity and the linearity of history, research under the typology pays much more attention to the stagnancy, interruptions in the trend, decline, formation of regional environment and simplification. It also recognises that history does not strictly follow all of the steps, although they believe the modern judicial system represents the trend of social development in human history. They suggest that the modernisation of the judicial system is established by many features, which can only be classified using logic (in practice they would be on a different level, more or less), and these features may vary according to differences in time, place, nation and ethnic group. Overall, I recognise that the modernisation of the judicial system is universal, but that issues regarding how this modernisation works, the possibilities and difficulties and the specific forms depend on the countries themselves. Countries do not have the

[211] Jing Yaoji, *From Tradition to Modernisation* (1973).
[212] David Popenoe, *Sociology* (1983).

same destinies, and nor do they have the same mode of modernisation.

CHAPTER 5: THE TRADITIONAL CHINESE JUDICIARY

History will move on and continue to impact the future. The current conditions in a society are the continuity in some forms of its past practices. Although there are opportunities for choices, interestingly enough, the way a society chooses to develop is not accidental. Thus, to understand the current Chinese judiciary and China's efforts to build a modern judiciary, we need to discuss the traditional Chinese judiciary and its historical origins. Just as when investigating a river, to understand its flow and destination, we need to know where its source lies and what kind of geographic and climatic conditions have nourished it, as well as the layout of the land through which it has passed and the reasons behind its present shape.

For over five thousand years, the Chinese people created a splendid culture on the land nurtured by the Yellow and the Yangtze Rivers. During this long period of time, dynasties came and went, and the Chinese culture waxed and waned; grand and moving stories played out on China's historical stage.

The year 1840, commonly considered by historians as the beginning of China's contemporary era, marked the start of China's journey towards modernisation. Chinese civilization experienced four major episodes of challenge and response. The first three episodes included the invasion of Beijing by the Anglo-French Allied Force in early 1860, the Sino-Japanese War in 1894[213] and the Russo-Japanese War in China's northeast in 1906. To these three episodes of challenge, China responded with the Westernisation Movement, which was marked by the importing of modern goods and weapons, institutional reforms through the Hundred Days' Reform in 1898 and the attempt at the end of the Qing Dynasty to establish constitutional rule, and later, the Xinhai Revolution[214] in 1911.

At the end of the First World War, China, though it emerged victorious, was not listed among the stronger powers of the time. Many Chinese believed that the first three episodes of response had failed. The May Fourth Movement was the fourth attempt at responding to previous challenges and culminated in the complete westernisation of Chinese culture.

After that, the communist movement and its extreme revolutionary theory started to disseminate, which then caused the establishment of the CCP in 1921. Since that time, the CCP formally appeared on the stage of Chinese history, and subsequently replaced the CNP to take control of

[213] Also known as the Jiawu War.

[214] Also known as the Hsinhai Revolution.

mainland China in 1949.

This chapter looks at the modernisation of the Chinese judicial system according to this delimitation of historical time, but focuses on the outcome of China's last episode of response and the impact of the modernisation of the judiciary in China, particularly contemporary China. The consequences of more than 100 years of judicial modernisation will then be analysed.

A. Profile of the Traditional Chinese Legal Culture as the Basis for the Traditional Chinese Judiciary

In ancient China, there was no concept of the court, justice or the judiciary, and also no concept of the legislation and administration that exist in the West. This thesis uses these concepts to describe and discuss the state functions, which were the same as today's judicial and administrative functions, in ancient China.

In ancient China, the judiciary existed as one part of the Chinese legal system, which has had a long history. China itself, of course, is one of the oldest civilisations in the world. American historian, Will Durant, uses the following to describe China in his book, *The Story of Civilisation*: 'She had a social organization, the people she united and the world she experienced was much longer than any history known to us …This society had started to civilize when Greece still lived an uncivilized situation.'[215]

When the West took the birth of Jesus as the beginning of a new era, China was already in the third year of the Early Han Dynasty and Chinese culture had already existed for several thousand years. In terms of its legal history, the Chinese legal system was born during the Xia Dynasty in 21st century BC, and thereafter developed without interruption for 4,000 years. The Chinese legal system distinguished itself in the world with its long history, clear evolution, rich content and solid materials.[216] Ancient documents from the Han Dynasty term law as 'Yu Punishment', customary law was its major content and it had emerged to a certain degree in the form of written law. After thousands of year's development through Xia, Shang, Zhou, Spring and Autumn Period, Warring States Period, Qin, Han, Southern and Northern Dynasties, Sui, Tang, and Song, Yuan, Ming,[217] a

[215] Will Durant, *The Story of Civilization* (1993) vol1. Li Zhousheng, *Chinese Legal System* (1985) 9.
[216] The editing Committee of Chinese Encyclopaedia, *Chinese Encyclopaedia, Law Section* (2006)762.
[217] Chinese Dynasties' Timetable, see Wen Ximou & Liang Peilu, *Analysis About Chinese Culture and State Circumstance* (1996) ; Jian Berzan edited *The Outline of Chinese History* (1979) vol 1-4.
2205-1766 BC Xia Dynasty
1766-1122 BC Shang Dynasty

special Chinese legal system had developed, and it held great influence in other Asian countries.

Ancient China's social structure composed of the whole and the part. At a national level, the nation was the whole, and the family the part; at the family level, the family was the whole and the individual was the part. But in the different circumstances these blood relationships, regions, groups or associations could become the whole, and the individual only was the part. The primary principle of social order in the society was that the benefit of the whole was treated above all else and the shapes of blood relations and imitational blood relations were the frames of society.[218]

The Chinese economy was closed and self-sufficient and was based on agriculture. The family, the plantation and the village were the units of social production. The people were both the producers and the consumers of their own products. The degree of the division in labour and the level of specialisation were very low and the links between economic organisations were weak. The people lived in a narrow, closed society and, as a result, the norms regulating social relations were based mainly on the patriarchal system of blood ties and the legal system developed in tune with this. Ancient China's legal system was characterised by arbitrary, hierarchical and cruel methods of punishment, which were used to maintain the dependency of producers on the economically dominant classes. On the basis of the economic and social constructions, the individual and group as a part of the society had to bear the duties of the whole, or the other sections of the whole, and had no rights.[219]

Because there were large numbers of private peasants, the frames of the blood relations and imitational blood relations were not only represented in the relationships between the emperors and the people, but also represented even more so in the relationships between the governmental

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1122-221 BC Zhou Dynasty
221-206 BC Qin Dynasty
206 BC -220 Han Dynasty
220-265 Wei Dynasty
265-580 Jing Dynasty
580-618 Sui Dynasty
618-907 Tang Dynasty
907-960 Liang, Shu, Wu, Jing, Tang Dynasties
960-1277 Song Dynasty
1271-1368 Yuan Dynasty
1368-1644 Ming Dynasty
1644-1911 Qing Dynasty

[218] Fei Xiaotong, *Provincialism China* (1985).

[219] In ancient China, there was no concept of rights in legal language; there was also no any word that corresponded to 'right' in English. Until the mid-19th century, an American scholar P. Martin and his Chinese associates tried very hard to find a Chinese equivalent of the English term 'right' while translating Wheaton's Elements of International Law into Chinese. They chose the word 'Quanli' which was a derogatory term in ancient Chinese to translate 'right', and persuaded the Chinese government to use it as the same meaning in English. Chinese 'Quanli' then had the same meaning as 'Right' in English and soon become a commendatory term and has been widely used since that time.

officers and the people. The Chinese people lived in such a society for more than 2,000 years;[220] 'the rule of man' prevailed throughout that long history. The laws were merely the tools in the hands of the emperor, which emphasised government control and obligations and totally ignored human rights. The main characteristics of the traditional Chinese legal system can be summarised as follows:

1. Secular rather than a religious legal system

During the medieval period in the West, the law was regarded as a reflection of God or some sort of highest natural order in the human world; it was called 'the natural law'. Therefore, the secular governors were not normally regarded as the highest authorities in the country; the lord and his subjects were in the same boat in the sense that they had to obey the natural laws. Although the right of interpretation was given to the lords, the masses also had the opportunity, which enabled them to challenge the authority in the name of God or the natural law. Therefore, law in the medieval West was framed in terms of 'God to the people'.[221]

However, law in the Chinese legal culture represented only the orders of the rulers. The Chinese never thought about the law as the orders of a God or a higher natural order. Therefore, the Chinese legal culture has been traditionally seen as being framed in terms of 'people to people, or ruler to the ruled', where the ruler's word is the highest law. This is demonstrated in the old Chinese saying: 'The monarch is the origin of law', which is in direct contrast to the 'God to people' frame in the West. The highest rulers in China were usually regarded as Gods by themselves and by ignorant people. The rulers were not only the secular leaders, they were also spiritual leaders. The people had to obey the orders of the rulers absolutely, from bodies to spirits. It could be said that the distance between the Chinese people and God was the same as the distance between the Chinese people and a democratic society ruled by the law.

2. Ethical nature of the culture

In the long process of China's development, the primary trend was towards Confucianism as the law, although in some periods the laws were written by legalists. The Confucian school advocated 'the three cardinal guides', namely 'the ruler over the whole subject, the father over the children and the husband over his wife'. It further advocated the 'Five basic virtues', which were 'Kindness (Ren),

[220] From 221 BC, the Oin Dynasty established the first country of feudal concentrated power in Chinese history, until the Oing dynasty was overthrown and the Republic of China was established in 1911.
[221] John Lock, *The Second Treatise of Civil Government* (1983) 57.

Justice (Yi), Good Manners or Ritual (Li), Wisdom (Zhi) and Honesty (Xin)'.[222] These ethical guidelines gradually became the key content for the legal system of the Chinese feudal society. This was especially true of 'Good Manners' and 'Ritual' (Li), which came to be considered as a special form of law that could be used in adjusting all kinds of relationships, families, marriages and property. The implementation of law was through the establishment of rights and duties. Whereas legal rights and duties are founded on the principle of equality of the holders, the implementation of 'good manners' was primarily a matter of the absolute duties the inferior toward the superior.

3. Family's ethical principles constituted an important component of the legal system

The law upheld the authority of the father, the authority of the husband and the superior position of the elderly. Accordingly, governors of the society did not legalise their authority through means of formal laws or by popular political and moral principles, but rather by 'dealing' with social matters as the head of a family.[223] The Chinese character for 'country' consists of two characters that are 'state' and 'family',[224] so the Chinese country itself was designed in accordance with the family model.[225] Under this cultural atmosphere, people were regarded as children of the rulers, and naturally became the servants of the rulers. The relationships between children and fathers and wives and husbands were seen as the same as the relationship between owners and property.

4. Emphasis was on the rule of men rather than the rule of law

Even the legalists, who paid much more attention to the rule of law, stressed the important role of 'the bright monarch' in society. Related to this was the combination of administrative, legislative and judicial authorities into one authority, with the emperor as the head. The emperor was understood to receive instructions from heaven and was the highest legal authority; his orders were the highest form of law. Logically, a single sentence of his could change or cancel the laws. The emperor was also a sort of high presiding judge; he himself could chair a court, order his ministers to make a trial, review all decisions of capital punishments and he held the power of the final verdict.

5. 'Good manner (Li)' maintains the social class system and uneven positions among people

[222] Ye Xiaoxing, *Chinese Legal History* (2000) 3.
[223] Max Web, *Chinese Religion* (1951).
[224] In Chinese, 'country' is translated as '国家', that is consisted by '国' (state) and '家' (family).
[225] Rene David, *The Contemporary Great Legal System* (1984)488.

Li stressed harmony and order in society. The key to 'Good Manner' (Li) was for people of different social positions to behave according to different rules. These rules were designed for different social classes to act within their compasses, [226] rather than for the social order to espouse equal rights, as was the case in the West.

6. Word for 'law' could be interpreted as the same as the word for 'punishment'

The cumulated laws in ancient China did not distinguish between criminal law and civil law, but simply stressed punishment and very little attention to civil matters. The word for 'law' in Chinese could be interpreted as the same as the word for 'punishment'. [227] Regulations for both criminal and civil law were in the same code, in fact, criminal punishments were the usual methods for addressing civil relations. It is accepted that the legal systems of the West developed in a horizontal way, with legal relations between individuals and the state being equal, the word of 'law' interpreted as 'right' [228] and the constitution served as compacts between people and their governments. However, the legal relations under the ancient Chinese legal system were basically vertical, and this was reflected in the relationship between the ruler and ruled. Therefore, even for a pure civil relation, criminal punishment and officials played a significant role.

B. The Characteristics of the Traditional Chinese Judiciary

The following characteristics of the traditional Chinese legal system extended for thousands of years and once had a significant influence on the traditional Chinese judiciary. To use the theoretical models of the traditional and modern judiciaries as a means to analyse the Chinese judiciary, which lasted a thousand years until the final phase of the Qing Dynasty, the Chinese judiciary can be regarded as a traditional judiciary.

1. There was a limited division of trial functions and governmental functions, and no separation of powers

Ancient China was a centralised, bureaucratic empire whose chief characteristic was that autonomous political and legal activities were limited. It was quite different from the European feudal countries in medieval times that had full autonomous political and legal activities, which led

[226] Qu Tongzu, *Chinese Law and Society* (1981)328.
[227] Ye Xiaoxing, *Chinese Legal History* (2000)3.
[228] *Black's Law Dictionary* (1979)1189.

these countries into a democratic society ruled by the law.[229]

In a unified and centralised country, the machinery of state governance was more developed than other countries in ancient periods; there was a division of governmental work, such as the financial and grain work and the management of public servants. The trial work was also divided from governmental works. The Tang Dynasty established six departments to deal with trial matters and had special officers to assist the chiefs of local governments with trial affairs at the local levels. In the Ming Dynasty, the government set up a criminal department to deal with trial matters at the central level and set up special agencies to take charge of trial affairs in the provincial governments. Under the provincial level, the chiefs of local governments dealt with cases in person and usually had special officers assisting them.[230]

These agencies and officers in the central and local governments were in roles where dealing with trial matters was the main focus; they never monopolised the trial power. Firstly, all departments in the central government had the authority to try cases. They were also able to try some cases together according to the emperor's orders or the codes. Consequently, every department had some trial functions and the structural features of the various powers were combined into one.[231] Secondly, at the local level, one of the daily duties of the heads of local governments was to try cases. Thirdly, from the central to the local governments, the highest officer of a government or a department had the authority to interfere directly in a case that had been dealt with by the government or the department, and make a decision on the case. As the supreme ruler, the emperor was able to intervene in a trial in a verbal or written method. For example, in the Qing Dynasty, all death penalty sentences were to be decided by the emperor in person.[232] According to statistics, there were roughly 3,000 death penalty cases per year in the Qing Dynasty and, therefore, the emperor had to deal with more than 10 cases every day.

Therefore, although some aspects of ancient Chinese society and the political structure were developing the division of governmental functions was still limited. In fact, the judicial function was never separated from other governmental functions in the traditional Chinese society.

2. The judicial work lacked independence

[229] Roberto Mangabeira Unger, *Law in Modern Society* (1976)155-158.
[230] Ye Xiaoxing, *Chinese Legal History* (2000)196, 288.
[231] Zhen Qing, *Study in Qing Dynasty's Judiciary* (1988)25.
[232] Ye Xiaoxing, *Chinese Legal History*(2000) 317.

In the traditional Chinese society, judicial work had no independence; it was just one part of the basic administrative works performed by the government in ancient China. The Qin Dynasty began to build a centralised country, which continued until the end of the Qing Dynasty. In this time China was an autocracy, which is the combination of every power into the one all-encompassing power.[233] In this regard, all of the authorities and the final control button for all resources were in the hands of the emperor. His orders were to be obeyed by all; just one single word from the emperor could change or even make a sentence.[234] Therefore, the Chinese people had a traditional method named 'Gao Yu Zhuang', which means that a lawsuit could be brought to the emperor and reversed, if the party felt that they had received an unjust verdict from a local officer. The emperors in Chinese history liked this method of trial very much, as reversing unjust verdicts showed that they were bright monarchs. The emperor's complete control over the trial work meant that the judicial power was highly centralised.

Additionally, as mentioned before, the highest officer of a local government or department in the central government had the authority to directly interfere with a case that had been tried by the government or the department, and make a decision on this case. Therefore, the trial work, particularly at the local level, was interfered with by formal or informal channels that might strongly influence the officer in charge of the case. As a result, corruption was in epidemic proportions in judicial activities. The parties would often endeavour to influence the case officer by informal or formal means. The typical informal method was the use of a monetary bribery, thereby bringing material wealth and benefits to the officer and his assistants dealing with the case. The past dynasties paid a very low salary in the formal system and usually an officials' formal income was not enough to support his entire family.[235] Therefore, the benefits from informal methods of persuasion, such as bribes, became a public secret.[236]

Additionally, the concept of the legal professional as well as legal theories was not formed in the long history of the traditional Chinese society.

3. There was one single judicial function

In ancient Chinese society, the judicial function was simply to maintain the authority of the father,

[233] Zhen Qin, *Study in Qin Dynasty's Judiciary* (1988)25.
[234] Ye Xiaoxing, *Chinese Legal History* (2000)2.
[235] In traditional Chinese society, the families were usually large and included two or three generations in the one family. Qu Tongzu, *Chinese Law and Society* (1981).
[236] Zihe Xiousan, *The Civil Trial and Civil Contract of Ming and Qing Dynasties* (1998)399.

husband and the Emperor as well as solidify the autarchy of centralisation.[237] Family ethical principles constituted an important component of the traditional Chinese legal system. Trials concentrated on upholding the status of a family member regardless of whether they were good or evil.[238] Accordingly, the officers dealt solely with the head of a family when dealing with trial matters.[239]

Although I cannot confirm that civil law did not exist, it is true that the traditional Chinese society stressed criminal law and belittled civil law. As a result, the judiciary focused on criminal punishment. The words for 'punishment' (Xing), 'law' (Fa) and 'rule' (Lv) all had the same meaning in traditional Chinese dictionaries.[240] This phenomenon of Chinese language differed completely from the Indian-European language family, where the word for 'law' not only had no relationship with 'punishment', but it was linked together with the word for 'right'. The opinion that the law was the same as punishment was held for thousands of years, right up until modern legal theories entered China late in the Qing Dynasty.[241] Punishment was the centre of the entire law system. From the Qin Dynasty to the Qing Dynasty, despite the fact that the names and style sheets of the laws had been changed, the basic principle behind the law, of punishment as the highest priority and the combination of all the laws into one criminal law, did not change. This was quite different to Roman law, which stressed the civil and criminal justice codes. Accordingly, the management and construction of the judicial work enforced the criminal law as the principal aspect in all the dynasties. For instance, in the Qing Dynasty, the governments at the local level received criminal cases regularly, but very few civil cases.[242] Finally, there were very few civil rules in the past dynasties and when civil rules existed; they were not considered a legal source.[243] Consequently, the chief function of the traditional judicial system was 'punishment', rather than settling civil disputes. Therefore, a number of civil disputes were solved by the folk organisations in the traditional society.

4. Trial work was in accordance with both the written law and the precedents

The traditional Chinese judicial system placed much importance on the statute law, and also used precedents in trial work. The Tang Dynasty was recognised as a flourishing age for the traditional Chinese society and was also a mature period for Chinese statute law. The rules made during the

[237] Qu Tongzu, *Legal Works Selection* (1998) 403.
[238] Qu Tongzu, *Chinese Law and Society* (1981)1-27
[239] Max Weber, *Chinese religions*(1951).
[240] Qian Zhongshu, *Guan Zui Pian* (1986) vol1, 285.
[241] Zhang Jinpan, *Chinese Legal Tradition and Modern Transformation* (1997) 428.
[242] Gao Daoyun edited, *America Scholars Discuss Chinese Legal Tradition* (1994) 474.
[243] Zihe Xiousan, *The Civil Trial and Contract in Ming and Qing Dynasties* (1998).

Tang Dynasty (Tang Lv), as the most famous legal system in Chinese feudal society, became an important legal source for the dynasties of Song, Yuan, Ming and Qing. Thus, statute law was the trunk in Chinese legal history.[244]

In the traditional Chinese society, trial work was carried out in accordance with the written law and the precedents. In the Han Dynasty, case law was developed quickly and practiced widely. The emperor in the Tang Dynasty had much respect for the statute and little for the precedent and so the precedent was rarely used. In the Song Dynasty, however, precedents were applied more and more in the trial practice. In the Ming and Qing Dynasties, statutes and precedents existed side by side. The principle of producing precedents from cases came about and was very popular during these two dynasties so that not only the numbers of precedents increased, but also their application was broadened. For this reason, the two dynasties were the top periods for the development of case law in ancient Chinese society.

However, the practice of imposing sentences without rules was widespread in the traditional Chinese society, particularly in civil trial work. The reasons were as follows. Firstly, the administrators at the local level had the authority to exercise jurisdiction over mainly civil cases and some small criminal cases, and their verdicts would be effective immediately. The verdicts of most of these cases made no mention to the rules, as happened often in the Qing Dynasty.[245] Secondly, feeling (Qing), reason (Li) and custom (Xi Guan) were considered in trial work. It was an important standard for officers to consider the elements of feeling, reason and custom when dealing with criminal and civil cases in traditional Chinese society. Custom was the folkways of resolving disputes concerning family, marriage, land, debt and credit in daily social life. 'Feeling' was the conscience of ordinary people in thinking and acting in different circumstances 'Not close to human feeling' was an expression used to describe an act contrary to feeling. For this reason, the officers had to consider reasonable requests of ordinary people. The reason was the common sense. It was a priority for officers to consider feelings and reason when they were trying a civil case and, in certain circumstances, the rule was subservient to the feeling, and sometimes the rules were sacrificed in favour of feelings. Thirdly, officers had large discretionary authority which they often abused. On one hand, the emperor was able to make or change a rule or sentence according to his will; his word was a kind of law. On the other hand, officers at different levels could use precedents or feeling, reason and custom instead of the statute when trying cases. As a result, officers could depend on their own will when choosing among these for a case. The way the different elements

[244] Zhang Jinpan, *Chinese Legal Tradition and Modern Transformation* (1997) 232.
[245] Zihe Xiousan, *The Civil Trial and Contract in Ming and Qing Dynasties* (1998).

were applied depended on the subjective preference of the official.

5. Trial work lacked procedure

In contrast with substantive law, there were very few procedural provisions in the laws of the dynasties in ancient China. Even when provisions did exist they were used mainly to punish criminals and concentrated on the trial jurisdiction, the relationship between the higher and lower level officers, as well hearing the accused person. As a result, the officers could follow their own indulgence in trial work, for example an officer was able to make a decision about how to investigate and collect the evidence of a case. The officer in charge of trying the case was a combination of detection, prosecuting and try powers all in one. The officers generally had no idea of procedure, there were no rules to restrict their actions and they believed in the presumption of guilt.

Because the traditional Chinese political structure was a structure of imitational blood relations, the emperor was the father of the people and the officers were their uncles. This relative political structure did not only reflect the social political relations, but it was also expressed in the trial work. 'Parent's Lawsuit', similar to a parent chastising their children's harmful behaviour or mediating a dispute between siblings, was a basic style of trial work.[246]

6. There was no distinct legal profession

Governmental officers were selected from imperial examinations in ancient Chinese society. These exams required the candidates to have knowledge of literature and history, as well moral character; however, there were no requirements for knowledge of administration or the law. Hence, the officers may have been able to teach virtue and morality to the people, but they had a severe lack of knowledge and experience in trial work. For this reason, the staff or assistants employed by the officers were important for carrying out their functions adequately.

In contrast with traditional Chinese literature, medicine, philosophy and history, the science of law did not thrive or prosper in ancient Chinese society and, hence, the legal profession did not take shape. The main cause for this was that the officials of past dynasties had a negative attitude towards the master of litigation (Song Guen). People believed that the master of litigation, who assisted in lawsuits, aroused people to disputation and spoiled social harmony and stability.

[246] Zihe Xiousan, *The Civil Trial and Contract in Ming and Qing Dynasties* (1998).

Therefore, the master of litigation had a bad reputation in the social mainstream consciousness. In this situation, an independent legal profession was difficult to develop.

Rulers in the traditional Chinese society were heavily concerned with shaping social harmony without conflicts. They did not care how the officers achieved this trial work and also did not encourage officers to study their trial skills. In ancient China, under the ethical patrimonial system, people sought the essence of justice, rather than the formality of law.[247] Additionally, trial work belonged to administrative work; the officers dealing with trial affairs were the same ones dealing with administrative affairs. Therefore, trial method could never become a specialised skill, despite the fact that the ancient Chinese law had several thousand years' history. Ancient Chinese law can, in fact, be interpreted as ethic legalised, rather than a real legal standard.

C. The Efforts to Learn from the West in Modern Chinese Judicial History

As previously discussed, the traditional Chinese judiciary was cardinally different from the modern judiciary. When the advance of modernisation knocked on the door of Chinese civilisation, the Chinese ancient legal culture was confronted with a serious challenge. Democracy and the rule of law as well the modern judiciary emerged in the West in the 16th century and may be viewed as an important accomplishment of human civilisation. In contrast, the Chinese legal culture and system, did not and indeed could not, evolve into a modern legal and judiciary system consistent with the principles of a market economy and democracy, despite the fact that it was a highly developed ancient culture. There were many reasons for this, but the most important are as follows. Firstly, the ethical nature of Chinese law hindered the practice of interests-based social activities, and thus prevented the economy from developing. The lack of economical development formed the basis for the limitations and control of rights. Secondly, the concept of the rule of man, stressing the role of the 'bright monarch', entrusted the power of maintaining order to the ruler, thus enabling them to enjoy a supreme position, free from any controls. The former prevented a capitalist economy from forming, and the latter generated a system that ran counter to democracy and the rule of law. Therefore, the traditional Chinese judiciary could not evolve directly into the modern judiciary, the modern judiciary had to be brought and transplanted from modern Western counties to China. For this reason, the ancient Chinese legal system and its judiciary had to travel on a reformatory path, which was full of obstacles and frustrations.

China was a country that was modernised under the pressures of foreign countries. After the Opium

[247] Max Weber, *Between Two Laws, Weber Political Wrttings* (2003) 75.

War in 1840, the strong Western powers opened the doors of China with the power of solid ships and guns. The conditions for a closed and self-sufficient country had been destroyed, and China was reduced from a feudal society to a semi-feudal and semi-colonial one. When this new world situation was presented, the Chinese people confirmed that China was no longer the 'entry' to the world, but rather the end of the tail. They realised this fact with great pain because they had always believed in China as the middle kingdom, and in Chinese culture as being the 'the origin of thousands of streams'. This view was again destroyed when the War of Japanese Aggression (1894-1895) ended with China's defeat; many Chinese introspected this failure with great anguish. The people came to the conclusion that China's failure was due to its traditional culture and system while Japan, after the MeiJi Reformation, had adopted and accepted the forms and contents of Western political and legal systems. Starting from this point of view, the aim pursued by China's vanguards then was the transformation of the political and legal system. For the realisation of this aim, through a long period of struggle, they sacrificed their blood and lives.

There were primarily two objectives for the development of law in modern Chinese history. The first was to establish a constitution; the second was to reform the legal system. The Chinese judiciary was also modernised during the process of legal development. By establishing a constitution, reformers wanted to transform the current power structure, where the emperor enjoyed absolute power and the people had no power, and to regulate the rights and duties of the state apparatuses in relation to the people. By reforming the legal system, the reformers wanted to change the old feudalist legal system and import the advanced legal system of the West. In the West, the mainstream legal systems had developed naturally alongside economic development; while in China, the establishment of such a legal system would have to come through subjective efforts. This process was marked by an admission of the backwardness of China, the hope of learning from the advanced countries in the West and the view that this was the means for 'saving China from dying away'.

1. 1898-1911: Judicial modernisation in the late Qing Dynasty

After 1860, Chinese society was impacted by a wave of modernisation brought in from the West. The Chinese government began to discover Western science and technology, and set up modern industry and commerce. Consequently, the social construction of China was changed; the number of people who stood for political reform and a constitutional government increased gradually in

society.[248]

The Wuxu Reforms of 1898 marked the formal beginning of efforts to reform the political and legal system in the history of modern China.

By the end of the late 19th Century, the Qing Dynasty was growing more corrupt by the day, while the national crisis deepened simultaneously. After 1895, since the Japanese war[249], China was pushed to the edge of subjugation due to the corruption of the Qing government and foreign aggressions.

Invasion by Western powers caused many changes to the social and economic relations in China. Western legal thoughts were introduced into China along with foreign goods and trade. The Qing Dynasty once again had to re-estimate the world outside, and itself enclosed by the walls of the Forbidden City. Some intellectuals saw the outside world through a gap in the door and realised that if China wanted to become a strong country, it would have to change its laws. The direction of such a change had to come from learning from the advanced Western nations. The bourgeois reformers, with Kang Youwei and Liang Qichao as their representatives, wrote a letter to the emperor asking for the reform of the despotic political system. They proposed setting up new systems, formulating a constitution and establishing a constitutional monarch[250]. They reasoned that the prosperity of the West was due to the 'separation of powers' and agreed that the Western system shows justice openly and had mutual checks and balances, which were the best ways to implement a legal system without fraud'.[251] If China wanted to become rich it would have to establish a system like that. Owing to the fact that the legislative, judicial and administrative powers under the Qing Dynasty were in the hands of the emperor, they asked the Qing government to establish a legislative institution to administer the legal reforms and to be responsible for drafting new laws. Additionally, they called on the Qing govemment to 'transplant the Western laws', and thereby make civil law, commercial law, litigation law and other laws according to the Western models. With regards to criminal law, though China had such a body of law a long time ago, they still thought that this original corpus was inadequate to protect social equality and justice, and so advised that the government also revise the criminal law by imitating the Western countries. Their proposals won the support of Emperor Guangxu, who later issued the order to carry out these reforms. During the 103 days of reform, 110

[248] Ye Xiaoxing, *Chinese Legal System* (2000)327-342. Zhang Baifeng, *Judicial System in China* (2000)11-12.
[249] In July 1894 (Jia Wu Year in the Chinese lunar calendar), Japan invaded the northeast of China. It then attempted to occupy the Shandong province of China. In the Weihai Naval Battle (the sea warfare took place in Weihai between the Japanese and Chinese Navies) the entire navy of Qing was destroyed. After the war, Japan forced the Qing government to accept the Maguan treaty, under which Qing ceded Taiwan and Laodong Peninsula to Japan and opened industrial and commercial ports to Japan.
[250] The 6th Proposal on Reform to the Emperor of Qing, Written by Kang Youwei.
[251] The editing Committee of Chinese Encyclopaedia, *Chinese Encyclopaedia, Law Section* (2006) 381.

laws and decrees were issued in the name of Emperor Guangxu. These laws and decrees related to all kinds of areas, such as politics, the economy, military, culture and education. [252] Unfortunately, in the end, the reformers did not triumph over the conservatives. Empress Ci Xi, who was against the reforms, gave the order for Emperor Guangxu to be put in jail. Reformer Tan Sitong and five co-reformers, known as the 'six figures', were arrested and killed in Beijing, and thus the Wuxu legal reforms ended in failure.

After the WuXu legal reforms, the Qing government came under pressure from other countries even though they had ceased the reforms within the country. The rush of foreign capital in to China required the nation to change its legal system according to the laws made in Western countries. Additionally, some Western powers asked China to recognise the so-called 'extra-territory rights'. In 1902, the Qing government named Shen Jiaben and Wu Tingfang as ministers for the law revisions. During the process of revision, they first organised a number of learned scholars to translate the codes and legal works of the Western countries. In 1907, in a memorandum to the throne on revising laws, Shen Jiaban wrote that they had translated 26 kinds of foreign laws. Selected scholars were also sent to Western countries to investigate their legal systems. At the same time, ancient Chinese laws were compiled for the purpose of comparing the differences and similarities between the Chinese laws and others in the West, as well as to absorb the positive aspects from these Western countries. They revised the criminal and civil law, drafted commercial law, drafted criminal and civil procedural laws, and for the first time in Chinese legal history, drafted the organisational law of courts. On the whole, the revision of the laws was an attempt to learn from the western ways. For instance, the traditional Chinese legal system mingled different branches of the law together so there was no formal distinction between civil law and criminal law, but after the revisions these distinctions were much clearer. In addition, the cruel torture system of the feudal society was abolished, the courts were established as a special trial institution and the administrative and legislative branches were formally separated. Japan became the most direct model in the process of legal reforms, because Japan and China were both countries of written law and, to some extent, shared more or less the same written language. Japanese laws had been mostly adopted from the German legal system and so the legal reforms of the Qing Dynasty were influenced greatly by the German continental legal system, both in framework and in theory.

In summary, from 1898, the Qing government began to reform China's political system and tried to

[252] The reforms included a. to reform the traditional imperial examination system and set up a modern school and education system; b. to reform the military system and replace the traditional swords, bows and arrows with modern firearms for the Chinese military force; c. to reduce armaments and government organs and cut down state expenditure; d. to set up channels for the government to find out situations and thoughts of the masses; e. to construct railway, exploit mines, open banks, incorporate firms, establish modern industries and protect patents; f. to reform the financial system and formulate budgets of the state.

practice the separation of three powers under the imperial power, based on the Western political system. The traditional Chinese judiciary, which had followed thousands of years of conventions and traditions, was stricken and collapsed.

In 1906, the Qing government changed the system of the chiefs of local government trial departments and the criminal department of the central government trying cases, and instead established a judicial system which was independent from the government. The courts were named 'Da Liyuan' (the Supreme Court) at the central level and the 'trial court' at the local level. This was the first time in Chinese history that the judicial system had been separated from the central powers and was in the hands of the local authorities. Therefore, this marked the time when the Chinese judiciary began to be modernised according to the West's legal principles. Thereafter, the Qing government made the Law of Da Liyuan Trial Organisation (1906) and the Law of Trial Courts at the Different Levels (1907). In 1911, the Qing government set up the prosecutor's offices in the central court and the local courts. Principles of the modern judiciary, such as judicial independence, a right to a public trial, the right to defend oneself and the concept of the jury were also adopted.[253] The judicial system continued in this form until the Republic of China was established in 1927.

After adapting to legal reforms and judicial modernisation, the Qing government also created specialized law schools. Until 1909, there were 47 law schools, which accounted for 37 % of the whole of higher institutes, and there were 12282 law students, who accounted for 52 % of the students studying at the higher institutes at that time.[254]

The process of establishing a constitution to aid in the creation of a modern political system, including a modern judiciary, in China, was very slow despite the legal reforms moving forward to some degree. In 1905, one side, the revolutionary forces with Sun Yatsen as their representative, were not satisfied with the reforms of the Qing government and hoped to push political reforms by means of revolution. In this year Sun Yatsen founded the Tong Meng Society, advancing the platform and raising the banner for a bourgeois democratic republic. These demands put the Qing government under strong pressure. The pro-Western figures inside the Qing government also began to advocate the establishment of a constitution in the hope it would maintain the rule of the crumbling Qing Dynasty. The Russo-Japanese War (1904-1905), gave the Qing Dynasty another strong warning. The reason that 'Big Russia' was defeated by 'Little Japan' was that Japan had enacted a modern legal system which included a constitution, while Russia had not. Following this

[253] The editing Committee of Chinese Encyclopaedia, *Chinese Encyclopaedia, Law Section* (2006)381.
[254] Li Dun Edited, *Legal Sociology* (1998) 698.

war, Qing government officials reported to the throne formally asking the government to establish a constitution. Responding to the reformers' demand, on July 16, Empress Cixi eventually agreed to send five ministers to make a fact-finding tour abroad in order to seek the practical way to maintain state sovereignty. The five officials chosen planned to pursue their investigations in two groups, one going to Europe and the other to Japan. Just before their departure from the Bejing railway station on September 25, a bomb planted by revolutionaries exploded, injuring two out of the five and thereby postponing the investigative tour until December 2 of the same year.

After returning home, the officials reported what they had learned from their trip and proposed their suggestions to the imperial court. The main purpose of their report was to persuade the Qing government to create a constitution. Three reasons were put forward for their proposal to convince the decision-makers that a constitution was good idea. Firstly, a constitution could maintain the rule of Qing court forever. Secondly, a constitution could reduce foreign aggression against the Qing government. And thirdly, a constitution could help the Qing government eliminate problems of repeated internal disorders. Rui Fang, one of the officials who had been on the tour, made three separate proposals. First, he sent an introduction of the constitutions of other countries. Then he demonstrated the various reasons why China should have a constitution. In the third, he stated the measures needed to reform the bureaucracy.

In July 1906, the Qing government convened a discussion on whether to have a constitution or not. Those in favour believed that under a constitutional system, even though the emperor's power would be limited in some ways, his authority would be increased. They believed it would also be easier for the government to manage the nation under such a system, as they were facing serious problems both internally and externally at the time. Those in favour insisted that if all of society was governed by the law, enjoyed their rights and took their responsibilities as regulated the government would have fewer burdens. Those who opposed the constitution argued that China was different from both the West (referring to Europe) and the East (referring to Japan). Europeans had the tradition of living under a constitution and the Japanese had the demand for a constitution, while in China, it was argued, there was neither a tradition, nor a popular demand. In addition, they debated that Chinese citizens were 'under-developed for a constitutional system'; therefore, they lacked the conditions for people to live freely under a constitution. They suggested that it would be a great disorder for a constitution to be established without adequate preparations. The Qing government offered a compromise between the reformers and the conservatives, and declared to

prepare the people first and when society was ready, a constitution would be established.[255]

On September 1 1906, the Qing government promulgated an order for the preparation of a constitution. In the order, however, there were only a few provisions for the reform of the bureaucratic establishment. The order was silent on reforms of the state regime, as well as the time for formulating the constitution. As a consequence, the bourgeois revolutionaries raised revolts for the purpose of establishing a democratic constitution.[256] Meanwhile, the constitutional reformists and regional forces launched a series of petitions demanding 'Prompt, convening of a congress and formulation of a constitution'. [257] Under such pressure, the Qing government drafted and promulgated an Emperor-ordered Constitutional Program, which specified a 9-year period for the preparation of formulating the constitution. The Constitutional Program stipulated the establishment of the supreme power of emperors with the parliament as just a decoration and contained only an incidental mention of civil rights. Under the Program, the power of the emperor of the Qing Dynasty was hereditary, sacred and inviolable; all powers regarding legislation, administration and justice were converged on the emperor, and the parliament was truly a consultant institute subject to the emperor's power.

The delusion of the Qing government with respect to the formulation of a constitution aroused the discontent of regional forces, and particularly the bourgeois revolutionists and the masses. The movements for formulating the constitution and realising autonomy as well as the protests of revolutionists surged forward. Under such circumstances, the bourgeois revolutionists staged the Wuchang Uprising on October 10, 1911; many other provinces followed and declared their independence. In order to extract itself from its perilous position the Qing government, within 3 days, concocted and officially promulgated 'Nineteen-Constitution Tenets', which was the first constitution in the history of China. This constitution was formulated under revolutionary pressure and, therefore, the Qing government made lots of concessions to the constitutionalists, including the establishment of a modern judiciary, to ensure the application of judicial power independently and fairly. Notwithstanding, the aim of perpetuating the throne, the Nineteen-Constitution Tenets affirmed the status of the constitution and provided for a cabinet system under an emperor-formulated constitution. The constitution survived for many of days before it became the funerary object of the Qing Dynasty with the Dynasty's death.

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[255] Zhang Guofu, *Brief History of the Legal System of the Republic of China* (1986)2-5. Xiao Mao, *History of Republic of China's Political System* (1992) 9-15.

[256] Before the Xinhai revolution of 1911, revolutionists led by Sun Yatsen and Huang Xing staged at least eight armed revolts, all of which failed.

[257] Before the Xinhai revolution of 1911, different provinces set up various organisations and autonomous associations, such as the association of the preparation for constitution. Some of them launched petitions demanding the convention of a congress.

2. 1912-1913: Judicial modernisation in a transitional democratic republic

The pioneer of the bourgeois revolution, Sun Yatsen, engaged in an anti-Qing Dynasty struggle in his early years. The failure of the Wuxu Reform of l898 reaffirmed his resolution to overthrow the Qing Dynasty. He organised a political party in Japan in l905, and soon after put forward the Three People's Principles of 'Nationalism, Democracy and People's Livelihood', and advocated the establishment of a democratic republic.

On January 1 of 1912, the Najing Temporary Government of the ROC, as the first Chinese democratic and republic government, was officially established; Sun Yatsen was elected the temporary president of the ROC. This marked the end of the feudal system that had been practiced in China for thousands of years. If, before that time, Chinese intellectuals simply examined and criticised the theories and the value judgments of the Chinese legal system through ideological and cultural points of view, from then on the Chinese legal system itself, including the judiciary, was faced with serious assaults and reforms. Deeply influenced by western political thought, the first action Sun Yatsen took was the formulation of a temporary constitution. He also began to pursue efforts to establish a modern legal system based on the Western model. Three months later, as the temporary president of the ROC, he issued a temporary constitution. It formed a constitutional document, and its content embodied the political principle of 'sovereignty is in the hands of people'. It also set out the principla of equal rights, and listed the constitutional rights specifically to be enjoyed by the people. In designing the country's political system, this document made reference to the political systems of the Western countries. In particular the 'separation of powers', a system of checks and balances with the Senate as the legislative organ, the Temporary President and the Sate Council as the administrative organs, and the supreme court as the judicial organ. This was the first constitutional document that was of any real significance in modern Chinese history. For building a modern judiciary, the constitution stipulated that the judges exercise the trial power independently, and are not subject to interference by the high officers, as well the salaries of judges could not be reduced during their tenure and they could not be transferred from their positions or removed without a recall according to law.[258]

Given the constant wars, disorders and the strong feudal influence of the time, the transplantation of Western legal thoughts and Western modern legal systems could never be a peaceful process. Taking the above Temporary Constitution of the ROC as an example, the reformers sincerely hoped that the written constitution could sustain a democratic republic. Therefore, the focal point for the

[258] Cai Degeng edited, *Xinhai Revolution* (1957) vol 8, 35-16.

struggle between the reformers and the conservatives became whether to defend the constitution, or to abolish it.

There came about a great struggle between defending the democratic principles of the Temporary Constitution and therefore protecting the political system of the new Republic, and restoring society to the despotic system and resuming the autocratic rule. On May 1 of 1914, Yuan Shikai, the President of the ROC completely overthrew the principles of the democratic republic established by the Temporary Constitution and restored the feudal system in practice. In December 1915, Yuan Shikai decided to restore the feudal system.

3. 1914-1927: The judicial modernisation under the Bei Yang (Beijing) government

The period between 1914 and 1927 saw China ruled by the Bei Yang (Beijing) government; it was the liveliest and also the ugliest period in the history of China's political modernisation. During this period, the two best ideas introduced from the West, namely the constitution and the parliament, became utterly discredited in China.

Yuan Shikai, Minister of Foreign Affairs and Military of the former Qing government, forced the Emperor of Qing to abdicate and defrauded the temporary president, Sun Yatsen. Yuan did not keep his promise to 'strictly adhere to the Constitution'. Instead he broke with the Temporary Constitution[259] and forced parliament to elect him as President and proceeded to dismiss the parliament as soon as he was elected. Just before its dismissal, the Nangjing Parliament, headed by Sun Yatsen, hastily passed a draft of constitution 'Tian Tan Draft of Constitution', under which the presidential system was denied and the responsible cabinet system and independent judicial system was established.

Yuan, obviously irritated by the draft, dismissed the parliament in January 1914 and organised members of his clique to form the Constitutional Conference to formulate a new constitution. With Yuan's instructions, the Constitutional Conference formulated a constitution, 'the Covenant Constitution of the Republic of China', which declared Yuan as emperor, with powers similar to a dictatorship. Therefore, the Covenant Constitution was also called Yuan's Constitution. Due to his strong desire to be an emperor and his dissatisfaction with being a president, Yuan replaced the cap of the president with a crown. However, he ignored the changes of the times and was not aware that

[259] In accordance with provisions of the Temporary Constitution, during the 10 months of implementation of the the Temporary Constitution, the Temporary President should convene a parliament and the parliament was responsible for making a formal constitution, and electing a President.

the democratic republic and legal ideals were deeply rooted among the people. Denounced by society, Yuan was obliged to cancel the Emperor System and 100 days later he ended his life in despair.

After the collapse of Yuan, the regional warlords directed a series of violent protests with respect to formulating a constitution. From 1916 to1927, China experienced confused fights between the warlords, and the changes of Beijing governments were like a trotting horse lamp. Whenever a regional power took the Beijing government by virtue of the military's power, they began to formulate a constitution of their own, attempting to legalise their power. Li Yuanhong, the President after Yuan Shikai, once called up the parliament to discuss the formulation of a constitution, which was broken up in discord due to factions quarrelling for the provincial system and eventually resorting to violence. Executor, Duan Qirui, headed the administration in Beijing twice, each time he attempted to establish a parliament of his own so he could formulate a constitution, but was unsuccessful.

During that time, many regions commenced provincial autonomy and provincial constitutional movements; some provinces even formulated their own constitutions but never put them into practice. The only officially promulgated constitution during that period was the constitution made, at a high cost, by the powerful warlord, Cao Kun, in 1922. However, this constitution became truly worthless after his defeat in the battlefields in the following year.

In contrast to formation of the constitution, the judicial modernisation still made some progress. After the Xinhai Revolution, Shen Jiaben and Wu Tingfang, who were in charge of legal reforms in the late Qing Dynasty, still paid attention to the function of building a modern legal system. Wu Tingfang also served in the Najing Temporary Government as the minister of justice. For maintaining a judge's independence, the judicial organ's law stipulated that judges could not join any political parties or organisations and could also not be elected as parliamentary representatives at the national or local level. In 1912, the department of justice issued an instruction that asked those judges already members of political parties to withdraw from these parties.[260] In 1915, Yuan's government adopted the Law of Judicial Officers' Discipline, and also set up the administrative tribunal, named 'Ping Zheng Yuan', which was in charge of administrative litigation. During this time, the government organised judge's exams of 6 types according to judge's qualifications, and 789 persons who passed the exams, were chosen to become the judges. However, at the time, China lacked qualified judges and so the governments had to nominate unqualified persons to try cases

[260] Xu Xiaoqun, *The Fate of Judicial Independence in Republic China* (1997) 5.

and local administrative officers were also asked to try cases.[261]

In this period of political chaos, how did judicial modernisation still maintain its progress? One of reasons was that the republic had just been built and people were still motivated to build a modern judiciary. The other reason was that most of the ministers of justice had the experience of studying overseas;[262] therefore, they could reasonably lead the system in its move towards modernisation.

If we state that creating a parliament and a constitution, as well as establishing a modern legal system based on the Western model by feudal gentry and bourgeois revolutionists during the period of the 1898 Reforms and 1911 Revolution were serious and sacred, then following the death of Yuan Shikai, they became real swindles and farces. The Western democratic political system was distorted shortly after it was introduced into China and the parliament's system was spoiled with a badly-tattered reputation, which brought a negative inf1uence upon the subsequent movements of political modernisation. For example, Mao Zedong, the former supreme leader of the CCP, drew a conclusion from the experiences of that period that the parliamentary system did not, and would not, work well in China.[263] As a result, the doors to the parliamentary system and the modern political system were closed after the founding of the People's Republic of China in 1949.

However, there is one thing that deserves commendation in the political modernisation movement of that period. Why did the establishment of a parliament and a constitution become a slogan with a great deal of public appeal at the time? The warlords were a band of ministers who had survived from the former Qing Dynasty with no democratic ideas; nevertheless, they talked incessantly about the democratic republic and a constitution after they seized the power. The reason was obvious: the people would be opposed if he had not carried out the democratic republic and constitution, no matter who he was, even if a regional warlord cou1d fight against the central government on the pretext of protecting the democratic republic. This phenomenon indicates that the democratic and political modernisation ideas spread broadly at the beginning of 20th century.

4. 1927-1949: The judicial modernisation under the CNP's Government

When the northern warlords fought each other in the 1920s, two strong parties appeared in southern China: the CNP and the CCP. As both parties were revolutionary, with the former representing the

[261] Li Dun Edited, *Legal Sociology* (1998) 697-698.
[262] In this period, the ministers of justice were changed frequently. Of the 10 ministers, Wang Conghui had a Ph.D in law from Yale University; Zhang Zhongxiang, Dong Kang, Lin Changming and Jiang Yong all studied in Japanese universities; Zhang Shizhao and Luo Wengan studied in England and Ma Junwu studied in Germany.
[263] Mao Zedong, On the People's Democratic Dictatorship , *Selected Works of Mao Zedong* (1966) vol 4, 340.

interests of the minority landlords and bourgeois and the latter representing the interests of the poor masses, Sun Yat-sen advocated the cooperation of the two parties, which led to the first cooperation between them. The Northern Expedition, in 1926, swept across the whole of southern China within half a year, under the leadership of the two parties. Chiang Kai-shek, as the leader of the CNP army and seized control of the government, could not stand the CCP's share in the final victory of the Expedition. He also did not make the CCP the opposition party in the democratic way, but tried to annihilate the CCP through slaughter, which led to an abnormally violent struggle. The appearance of a single-party dictatorship in the Chinese political arena was the main reason that the modernisation of China, including judicial modernisation, was frustrated and could not develop healthily.

In 1927, the CNP set up the ROC in Najing. Their political system separated the central authority into five powers: legislative, administrative, judicial, examinatorial and supervised authorities. Forced by the leftists within the CNP,[264] Chiang Kai-shek, in the 1930s, promulgated 'the Covenant Constitution during the Instructing Politics Period' after his adoption of the single-party dictatorship. The basic principle of the Covenant Constitution was to adopt the instructing politics under the single-party dictatorship of the CNP. The CNP created a theory of 'Three Steps' to implement a constitution in China. The core of the theory was that China needed a period of military regime to safeguard the stability of the State due to the chaos caused by war, which was called the 'Military Political Period'. As the intelligence of the Chinese people was obstructed and they could not realise democracy by themselves, a period of 'Instructing Politics' was needed to give the people a democratic education. Only after the Instructing Politics Period could the constitution be adopted. The so-called 'Instructing Politics' meant that the CNP, on behalf of the people, exercised the ruling power of the State by instructing the people. Moreover, the CNP told the people that the Instructing Politics Period was a long-term plan. Thus, the single-party dictatorship of the CNP was legalised. Thereafter, the CNP governed the country and established firmly the principles that 'the party's doctrines had the force of law' and 'the party's politics determined justice'[265], in the legal area and the judicial system.

Similarly, although the judicial system was established separately, some principles of the modern judiciary were adopted by the CNP government; the CNP adopted a series of measures to strictly control the judicature. In 1926, the CNP government abandoned the prohibition that the judges

[264] Adopting of a constitution as a weapon against Chiang Kaishek, the leftists, headed by Wang Jingwei, formulated a draft of constitution of the Republic of China in 1930.
[265] Sun Yatsen, *Selected Works of Sun Yatsen* (1956). Sun ke, *Selected Works of Sun Ke* (1972).

could not join political parties and asked judges to become members of the CNP.[266] Additionally, candidates recommended by the CNP were given priority to be employed by the judicial organs.[267] Governing the country by the party not only required the laws to reflect the party's doctrines and the judicial officers to abide consciously by the party's doctrines in trial work, but also meant the party played a leading role in legislative work. In this way, the CNP was in direct control of the legislation and influenced the judicial area strongly. The CNP also caused the judicial system to be strongly politicised, which had a great influence upon the subsequent history of judicial modernisation in China.

Under the pressure from the CCP to establish a modern democratic political system in China, the CNP government endorsed 'the Constitution of the Republic of China' in 1946 after the victory in the anti-Japanese War. This constitution was adopted on the basis of Sun Yatsen's thoughts of 'three People's principles and Five rights of Constitutionalism' and, therefore, it had already been in use in Taiwan. In accordance with the theory of 'Instructing Politics', however, the CNP formed almost at the same time 'the Temporary Regulation in the Period of Mobilization Order for Suppressing a Rebellion'. Under the regulation the president was accorded with a number of special dictatorial rights and the civil rights of the people were ignored, which led to the long-term stoppage of the enforcement of the constitution. The Temporary Provisions were not repealed, and the constitution was not applied until the political reforms by the CNP in Taiwan in the 1980s. Therefore, it was the Instructing Politics rather then the constitution that was implemented in mainland China during the long period of the leadership of the CNP. This situation of the judicial system under the control of the CNP was changed when The Judicial Organic Law was adopted in 1947 and after the CNP government moved to Taiwan in 1949.[268] In fact, it was after 1980 that the judiciary of the Republic of China was transformed into a truly modern judiciary.[269] During this time, the CNP's government adopted the Interim Standard of Judicial Officers' Appointment, the Regulation of Judicial Officers' Examination, and the Method of Judicial Officers' Training. The government also organised judge's exams 49 times, which saw roughly 3000 persons pass and become judges. At the same time, around one in four graduated students studied in law school at university, and a quarter of the students studied law overseas.[270]

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[266] *The Documents of the Chinese National Party' Congresses* (1985) vol 2, 501. *Legal Review, China*, (1927) Vol 185, 137. Ye Xiaoxing, *Chinese Legal System* (2000) 374 -395

[267] *Judicial Bulletin, China*, (1935) vol 29,1-3.

[268] The Judicial Organic Law adopted the modern judicial principles and institutions, such as Judges exercising judicial authority independently, the judicature was authorised to interpret the meaning of the constitution and laws, the systems of national judicial examination and judges' training. But CNP government moved to Taiwan soon after the law was made, so the law was enforced only in Taiwan. After CNP moved to Taiwan to consolidate the party organisation, the organ of CNP in the courts was formally abolished.

[269] From the 1980s, the CNP in Taiwan ended the martial law, started political reforms, ended the single-party dictatorship and opened forbidden parties and mediums.

[270] Li Dun Edited, *Legal Sociology* (1998) 698.

D. Lessons drawn from the 50 years of judicial modernisation

From the late 19th century to the middle of the 20th century, the political, legal and judicial modernisations were regarded as a nice political ideal, for which the Chinese people had struggled for the past 50 years. During this 50 year period, there were successes and hopes, but mostly failures and setbacks. Why did the Chinese people not succeed in their struggle for this goal? In my analytic point of view, the reasons are as follows:

1. Turbulent society and a lack of peaceful political situations made China short of the conditions needed for political and legal modernisation

In the past 50 years, Chinese society has been through a period of radical social turbulence, which resulted in the collapse of the dynastic-ruling system that China had had for several thousand years. The social turbulence was also contributed to by the lack of an authority in a society that had been used to the control of a powerful monarchy. During the first half of the last century, the Chinese people were faced with a constant menace from foreign powers and survival of the nation was at crisis point. The major task for the Chinese people was to save the nation from extinction. In this circumstance, demands for freedom, democracy and human rights as well the rule of law tended to be ignored, and individual freedom and rights were sacrificed to strengthen power of the state in order to save the country. After the collapse of the Qing Dynasty, there were no political powers that could effectively control the country and disputes between the different political powers occurred. When different political parties went on the political stage, there was neither a legal system for coexistence and cooperation, nor the spirit of negotiation and concession for resolving disputes, instead each party tended to solve disagreements through violence. This situation added internal turbulence to the external crises and put the country through half a century of civil war and chaos. Since the 1920s, China was a stage for the CNP and the CCP. The two parties cooperated twice to fight against common enemies, and twice they broke up and fought each other after the common enemies had been defeated, for they could not coexist or tolerate each other. Had the CNP dealt with relations between the two parties in the spirit of democracy and co-existence and with legal means instead of eliminating the CCP to strengthen its rule, it may have been possible to establish a modern political system in China by by peaceful meand through the rule of law and parliamentary democracy.

However, the CNP and the CCP both decided to take and consolidate their political power through violence. Class struggle and violence cannot coexist with democracy and the rule of law. Therefore,

the establishment of a democratic political system and a rule of law society, as well as a modern judiciary could not be achieved under such turbulent conditions. Only a centralised power can deal with turbulence, even in a country that has established the modern political system. The implementation of the rule of law and judicial modernisation will be interrupted in times of war and social unrest. When analysing the reasons for the transition of medieval Europe from a monarchy dictatorship to a democratic constitutionalism, Mr. Gu Zhun, a famous Chinese economist, noted that medieval Europe went through a period of liberal dictatorship. During this period, European countries won dukes and princes over by setting up parliaments and thereby unifying political powers and military forces by having the dukes and princes come to the palaces of the central monarchy instead of conquering them. He also pointed out that struggles between a few privileged figures will lead to parliamentary politics only if it follows certain charters and doesn't completely rely on violence. Every aspect of such struggles does its best to win the support of the masses in accordance with such charters.[271] Thus, it can be concluded that the establishment of the modern political system and the rule of law requires peaceful political environments and the spirit of making concessions to resolve problems.

Which begs the question, why did China choose not to reform to a system of democracy and rule of law and, instead, begin a period of war and chaos following the end of the feudal dictatorship? There might be many reasons for this. It may be a profound question related to the character of the Chinese people and the Chinese political structure. The Chinese people have always been a tolerant people, and yet they also tend to go to extremes, making it easy to end up in a violent revolution. This also relates to the social structure and relations between the different classes in China. Cruel oppression by Chinese rulers often resulted in fierce revolts by the masses. Therefore, Chinese politicians emphasised 'awaking the masses by means of revolution' and transforming the society by means of violence, rather than by advanced rational thought. This is a theoretical political reason for the failure of a democratic political system and the rule of law in China. The decision to use violent means or peaceful reforms for the development of a society mostly depends on the degree of intensive relations between the different classes of society. The use of violence should always be the last choice. Violence brings many adverse effects regarding the establishment of a democratic political system and the rule of law. It is easy to stir up class hatred and this can result in social turbulence where violence is used to oppose violence and in turn leads to a vicious cycle of violent revolution. It also prevents the people from adopting the correct attitude towards good and rational legacies left from former societies and tends to lead the society from one extreme to another. France is the only Western nation whose relevant history can be compared to China's with respect to

[271] Gu Zhun, *Collected Works of Gu Zhun* (1995) 357-358.

frequent violent revolutions and social turbulence making it difficult for the country to establish a democracy and the rule of law. A comparison of French and China may be helpful to understand the tortuous course of China during the first half of the last century with regard the implementation of a democratic political system and the rule of law.

France adopted eleven constitutions during more than 80 years of building a democratic political system; from the adoption of the first constitution by the Great Revolution of 1797 to the adoption of the constitution of the Third Republic of France.[272] Among the eleven constitutions, there was the constitution of the monarchy that resulted from compromises reached between the bourgeois and the monarchy, the constitution of the emperor made by feudal remnants, the constitution of the republic of the bourgeois, the constitution of the radical revolutionists and the restorationist constitution of the feudal dynasty. The adoption of each constitution was an outcome of a class struggle and sometimes even a bloody conflict. This situation was parallel to the situation in China in the last century, during which the social turbulence resulted in struggles between revolutions and retrogressions, restorations and anti-restorations and changes of constitutions and political systems were frequent.

What were the reasons for such a similar situation in France? The main reason was that the feudal oppression in France was very cruel, just as in China, and as a consequence, the French people were rich in revolutionary spirit and had a violent revolutionary tradition.[273] When the feudal autocracy was ended, the French people overthrew the feudal autocratic dynasty using violence. As a result, struggles between the restoration and anti-restoration groups were intense and internal conflicts and struggles among the revolutionary classes and between certain careerists and other forces were very complex following the revolution. The complex class contradictions and struggles made it very difficult for the society to stablise itself. The instability and frequent changes in state powers caused great political instability and meant that the democratic constitution could not be developed.

I believe that constant peaceful reform is the best way to avoid revolutions and social turbulence. It is very important to use legal means to treat dissatisfied feelings and opposition. Issues should be resolved in the legal channels based on the rule of law rather than the use of suppression and violence. Resolving social contradictions using democracy and the rule of law is the only correct way.

[272] There were eight constitutions adopted respectively in 1791,1793,1795,1800,1802,1804,1814,1830,1848,1852 and 1857.
[273] France had a relatively long history of feudal society. During this history the monarchs practiced autocratic rule and feudal landlords carried out cruel oppressions on peasants, which caused many peasant revolts and revolutions.

2. Failure of political and legal modernisation due to from a lack of social support

Democracy, the rule of law and judicial modernisation were the outcomes of the economy, ideology and culture of the modern bourgeois. In China, however, the political, legal and judicial modernisation lacked the support of social powers due to the immaturity of the economy, ideology and culture. After the 'Wuchang uprising', the bourgeois revolution, directed by Sun Yatsen, adopted a Temporary Constitution that was full of bourgeois political and legal thoughts. This constitution had the support of Sun Yatsen's political theory of the Three People Principles and established a kind of political regime with a cabinet and modern judiciary, and had measures to protect the citizen's rights. How was it not a success? One of the important reasons, I believe, is that China was short of strong social forces required to establish and consolidate the democratic political system and the rule of law. The accidental victory of the 'Wuchang uprising' did not imply that the Chinese bourgeoisie had gained an advantage from the perspective of the classes' struggle. In the early part of last century, the Chinese bourgeoisie was so weak that they did not have sufficient political and military powers to support the revolution. Therefore, Sun Yatsen had no choice but to surrender state power. The fruits of the revolution were seized by the surviving bureaucrats of the Qing Dynasty. The premature end of the bourgeois democratic political system in China illustrates that Chinese society, with its natural economy, was not strong enough to support the development of a democracy and the rule of law.

At the beginning of 20th century, China was still a society in which a natural economy played a dominant role, its commodity economy was extremely undeveloped, and the bourgeoisie and modem industry was very weak. At the time of 1911 Revolution, the number of industrial workers in China was on1y about 0.6 million,[274] and these workers were very poor and did not have many rights. The conditions of the bourgeoisie were even worse. In 1900, in the 13 main industrial development provinces in Southern China, the number of factories employing more than 500 workers was only 156, but the worker popu1ation in these factories accounted for 30%-40% of the total working population of China at the time. There were only several hundred capitalists at the time. Up until 1949, there were 2858 enterprises owned by bureaucrat-capital, which had about 1.19 mi11ion emp1oyees, including 0.75 million industrial workers. The industrial capital added up to roughly 17 billion yuan in China.[275]

Therefore, we can conclude that during the first half of 20th century, the bourgeoisie and modern

[274] Political Institute of the Liberation Army, *Talks on the History of the CCP* (1984) 10-11.
[275] Fang Weizhong edited, *Chronicle of Economic Events of the People's Republic of China (1949-1980)* (1982) 8.

industries in China were undeveloped and the natural economy and the agricultural economy still held dominant positions in Chinese society. This was one of the main reasons why democracy and the rule of law did not succeed in China.

3. Rulers had no historical initiative to face the social crises and continually lost the opportunity to modernise the political and legal systems

Had Emperor Guang Xu of the Qing Dynasty, at the time of the Wuxu reforms in 1898, adopted and pursued the reform opinions proposed by Kang Youwei, it would have set China on the road to a constitutional monarchy and political modernisation, as was the outcome of the Meiji Reformation in Japan in 1868. However, China missed this invaluable opportunity due to the Empress Cixi's stubborn opposition to political reforms. The war between Japan and Russia in 1905 made her wake up to reality to some degree, however, she still persisted in cheating the people by virtue of preparing for the enactment of a constitution. Thus, once again China lost an irretrievable chance for political modernisation. When the 1911 Revolution broke out and the Qing Dynasty was close to its end, it was too late for Cixi to take action and modernise China's political system. The rulers of the Qing Dynasty made many mistakes, as did Jiang Kaish's government.

Prior to the Anti-Japanese War, the CCP called for a democratic congress to create a democratic constitution; however the CNP ignored this call.[276] During the Anti-Japanese War, the CCP again appealed for the establishment of a democratic republic and once again the CNP still showed no interest.[277] After the Anti-Japanese War, the CCP still urged negotiations between the CCP and CNP to hold a national congress to establish a united democratic government and a modern political system. Jiang Kai-shek's government pretended to agree with the CCP's proposal, but in reality they were preparing for a civil war to eliminate the CCP and concocted a constitution and political system under a single-party dictatorship. When the CNP's government was near collapse in 1948, it demanded, in the peace talks with the CCP, that its constitution and legal system were maintained, but it was too late. The CCP refused the CNP's demands and insisted that the CNP's constitution and legal system be abandoned.

The above discussion demonstrates that Chinese rulers obstinately adhered to past practices; whenever social crises appeared, the rulers could not take the initiative to carry out the necessary reforms. In the last century, they adopted a highhanded policy to maintain their rule and eliminate

[276] Mao Zedong, *Selected Works of Mao Zedong* (1991)Vol 1, 257.
[277] Mao Zedong, *Selected Works of Mao Zedong* (1991)Vol 2, 382.

the opposition. Even when reform occurred, the rulers used violent means to suppress them. Each time a ruler managed a reform, they lost an invaluable opportunity to implement political and legal modernisation and increased the possibility of a revolution.

While summing up lessons from the failure to modernise the political and legal systems at the end of the Qing Dynasty, one scholar noted that the rulers of the Qing Dynasty didn't take the historical initiative to the reforms, for they were too decadent to have the strength to take prompt and active responses to the historical trends that faced them. Their mindset of adhering to past practice caused them to lose opportunities while evading the challenges. Their obstinate conservatism prevented them from judging and sizing up the world situation. The Qing Dynasty missed a great deal of opportunities while it hesitated for a long time at the historical crossroads, and finally lost the conditions for peaceful reforms and the possibility of peaceful transition from the feudal dynasty to a constitutional repub1ic.[278]

4. China lacked enlightenment and dissemination of democratic politics and the rule of law in a real sense

The essence of democracy and the rule of law fully guarantee freedom and civil rights; it can be said that there is no democracy or the rule of law if there is no freedom and civil rights. The democratic politics and the rule of law cannot be established before there is a full spread of free and democratic spirit and the complete elimination of the feudalism autocracy. However, democratic politics and the rule of law, as well as the modern judiciary, were hastily imported into China, a country that was in urgent need of saving. China, at the time, was trapped in the net of traditional Confucianism, adhering to cardinal guides and constant virtues and the disciplines between the monarch and his subjects. After the 1930s, China once again fell under a single party autocracy and was dominated by that political party's ideologies. As a result, propaganda of the party's ideology was considered superior to democratic ideas and thoughts of freedom.

Before and after the Wuxu Reforms of 1898 and during the period of the May 4th Movement, there was a dissemination of the Western thoughts of democracy and freedom as well the rule of law. However, such dissemination only lasted for a short period and did not have a significant influence. The thoughts of freedom, democracy, the rule of law and civil rights only exerted an influence on a small number of intellectuals. Needless to say, the mass of workers, peasants and other labouring

[278] Zhang Jinfan edited, *Review of the rule of Law in 20 Century of China, Comprehensive Comments on Making a Constitution at the End of Qing Dynasty* (1998) 165.

classes, who accounted for 90% of China' s population, had not been moved by those thoughts, even the upper classes of the society at that time, such as the bourgeoisie, country gentlemen and government staff were not influenced. Due to a lack of wide-ranging ideological enlightenment, the revolutions that occurred in the capital appeared to the masses only as changes in emperors. The masses did not understand the political ramifications of such revolutions. Even the few intellectuals and politicians, who accepted the ideas of democratic politics and the rule of law, had been influenced for too long by traditional Chinese thoughts, and took a conservative even opposing view towards freedom and democracy. They all, to varying degrees, interpreted the conceptions of freedom, democracy and the rule of law with a traditional Chinese cultural and language outlook. Almost all of the prominent Chinese politicians in the last century considered that freedom, democracy and the rights of citizens should not be given out too quickly or liberally in China. They preferred to strengthen the state powers and required individuals to sacrifice their personal freedom for this purpose. Therefore, the adoption of a democratic political system was to 'strengthen the country', and not to 'protect the people'. 'Strengthening the country' was sometimes used by certain careerists as an excuse for strengthening their own powers and adopting autocracy.

Kang Youwei and Liang Qichao were pioneers in spreading the Western democratic thoughts in modern China, and put forward the slogan 'upholding democratic rights and struggling for freedom'. But Mr. Kang considered that it was not practical to give freedom and democratic rights to the subjects, he considered it 'to do something beyond one's capability and to teach a little child who can't walk to climb over a wall'.[279] He said that in China, 'to adopt republicanism means confusion, and freedom means suicide'.[280] According to Kang, the purpose of reform was to strengthen the country and consolidate the sovereignty of the emperor. While the five ministers who were sent abroad by the Emperor Guang Xu on a tour of investigation suggested that the Qing Dynasty should adopt a constitution, they advocated restricting and suppressing rights of the people. They believed that the rights of the people were claimed so much in the Western countries that the people found it easy to defy their superiors and start a rebellion; the only way for China was to learn from Japan and 'impose restrictions on rights of the subjects'.[281]

Sun Yatsen was a great bourgeois revolutionist deeply influenced by Western democratic thoughts; he took the rights of the people as his political program. In his early years he had opposed citizen rights, and opposed even more strongly giving the citizens freedom. In his view, the quality of the Chinese people was too low, as 'they had just been freed from the position of slave and raised

[279] Kang Youwei, *Collected of Political Articles of Kang Youwei* (1981) Vol 2.
[280] Kang Youwei, Comments on Saving China, *Collected Works of Kang Youwei* (1987) Vol 1.
[281] *Historical Files of Preparation of Adopting a Constitution at the end of Qing Dynasty* (1983) vol 1, 101.

suddenly to a master position, they did not yet know how to behave as a master. If we give them rights, they would offend against their superior and act wildly in defiance of the law.'[282] He also said that the Chinese 'enjoyed too much freedom so that they were just like a pile of sand'.[283] Consequently, he did not favour striving for democracy, freedom and the rule of law through revolution, but advocated sacrificing more personal freedom for the prosperity and freedom of the country. It is easy to understand why Sun Yatsen, facing a national crisis, gave first priority to independence and the survival of the country, and demanded the people sacrifice their own interests for this purpose. He did not realise, however, that only the protection of the citizens' freedom and rights along with democracy and the rule of law could inspire the masses to fight jointly with the country, for the country. Why were the Chinese people like a pile of sand and could not unify to fight for the country in the past? The reason was that the country and the governmental officers had always suppressed them instead of protecting them. As such, how could the citizens be called to fight for the country? Sun Yatsen came to understand this point just before his death. While summing up the reasons for the unsuccessful revolution before his death, he left an important teaching: 'It is completely necessary to arouse the masses of the people.' How could the people be aroused? By giving them such rights as freedom, democracy and equality with the protection of a democratic political system and the rule of law. However, Sun Yatsen's theory in his early years that 'the quality of the Chinese people was so low that they could not be given much freedom' had a significantly adverse affect on the development of political modernisation in China.

Sun Yatsen's theory that 'the quality of the Chinese people was so low that they could not be given much freedom' was also appreciated by the leaders of the CCP. Based on this theory, they advocated putting democracy into practice slowly and not giving the people too much personal freedom. They also demanded the people sacrifice individual freedoms and rights for the benefits of country or collective. They inculcated this position as a new social morality. When Mao Zedong, former leader of the CCP, talked of freedom and democracy, he emphasised the significance of discipline and concentration. One of his famous sentences was that 'we advocate the freedom under the leadership and the democracy directed by the concentration'.[284] It is clear, therefore, that China lacked a real and wide-reaching enlightenment of democratic politics and the rule of law and, consequently, personal freedom, democracy and the rule of law were not fundamental values of the Chinese people.

Modern intellectuals in China regard the saving and survival of the nation, making the country rich

[282] Sun Yat-sen, Success of the Revolution Depending on Propaganda, *Selected Works of Sun Yatsen* (1956).
[283] Sun Yat-sen, Second talks on the Principle of Civil Rights, *Selected Works of Sun Yatsen* (1956).
[284] Mao Zedong, *Selected works of Mao Zedong* (1977) vol 5, 368-369.

and building up military power as the means and purpose of political modernisation. From this perspective, the revolutions and political reforms were very different from the demands proposed by the Western bourgeois revolution; Chinese revolutions had completely different meanings. When the British fought for the democratic political system, their slogan was 'no representation, no tax'. A Chinese peasant revolutionary slogan was 'welcome the Daring General (a peasant revolution leader), we will not pay taxes in grain'. The Chinese people were used to expecting a saviour to emancipate them. During the Great Revolution, one French slogan was 'liberty, equality, fraternity or death'. In contrast, one of the Chinese slogans was 'without reform, no way to survive'. Thus, the lack of support for democratic thought and the protection of freedom and rights made Chinese political modernisation movement short of cultural soil and caused it to be separated from the basis of the broad masses of people. As a result, the movement of political modernisation had no support from the people. For China to walk on the road to democratic politics and the rule of law, it needs a true enlightenment of freedom, democracy, human rights and the rule of law. In China, such enlightenment must be accompanied by a rational criticism of the traditions. Traditional Chinese thoughts did not produce science, democracy and the rule of law. Therefore, criticism of traditional Chinese thoughts is required for the development of democracy and the rule of law as well as the establishment of a modern judiciary.

E. Conclusion

Thus, one can see that to learn from the advanced countries of the West and to reform the traditional Chinese legal system and its concepts to a modern system were hallmarks of modern Chinese legal history. Most of those who called for, and took part in, the reforms were scholars, including revolutionary leaders such as Dr Sun Yatsen. They suffered from the decline of China and hoped to save China by learning from foreign cultures. For instance, one of the important reformers, Yan Fu (1853-1921) had gone to Britain to look for ways to vitalise China. Upon returning he translated works by Western enlightenment thinkers introducing Western legal systems and legal concepts to the Chinese people. He advocated that China should learn from the Western legal model and accepted the concept of 'people are born equal by nature so they have equal rights'; he also thought that the western social contract theory should replace the traditional Chinese rule of man. Liang Qichao (1873-1929), another scholar and a famous contemporary reformer Yan Fu, believed that Japan was successful in learning from the West, and China should follow the Japanese way. During his process of leading the revolution, Dr. Sun Yatsen lived for some time in the American Islands of Hawaii. He transferred himself from a medical doctor to a politician, stimulated partly by his foreign experiences, which in turn broadened his views when designing the democratic system for

China. Common to all of these scholars was a deep criticism of the traditional Chinese legal system and a belief that the only way out for China was to learn from the countries of the West, and to construct a modern legal system, including a modern judiciary.

Between the 1920s to 1949, all kinds of Chinese political forces targeted a political system that was suitable to their own political aims and goals. After its founding, the CNP appeared on the Chinese historical stage. From the first Temporary President of the Republic of China in 1912 to 1947 the CNP government adopted the first constitutional law of the Republic of China. In a constant effort to learn from the West, China tried to establish a political system of democracy and republic. The judiciary also transformed from the tradition to the modern. But due to China's chaotic internal situation, caused by war at the time,[285] its military objective was prioritised by the CNP's government since its establishment in 1927. Moreover, the CNP's government practiced the policy of governing the country by the party and therefore the principles and institutions of a modern democracy could not be enforced. However, it can be said that this was a period of great opportunity for importing and transplanting Western judicial principles and institutions to China. The modern Chinese judiciary was thus established at its initial stage;[286] despite the fact that its real operation differed greatly from a modern judiciary.

[285] In 1911, Qing dynasty was overthrown; the Republic of China was established. 1911-1927, the warlords were engaged in warfare. 1927, the CNP government was established and started in a unified war, until the Anti- Japanese War in 1937-1945. 1945-1949, civil war was waged between the CNP's government and the CPC. In 1949, the CNP's government was defeated and moved to Taiwan.
[286] Zhang Baifeng, *Judicial System in China* (2000) 13.

CHAPTER 6: THE CHINESE JUDICIARY FROM THE REVOLUTION OF 1949 TO DATE

In 1949, the CCP won the civil war, marking the end of an era. In January 1949, the CCP issued an announcement during the peace talks with the CNP demanding, amongst other things, the abolition of the constitution and those laws, including the judiciary, made under the CNP regime. One month later, the Central Committee of the CCP issued its Directive on the Abolition of the Code of Six Laws and the Establishment of Judicial Principles in the Liberated Areas, indicating clearly that all laws and regulations made by the CNP's government were thereby invalid.

On September 29 of 1949, a day before the founding of the People's Republic of China, the First Plenary Meeting of the Chinese People's Political Consultative Conference adopted the Common Program, which served as a temporary constitution for the transitional period. The Program outlined the nature, tasks, and the guidance of the newly born country in the form of fundamental law. This constitutional document made it clear that, with regards to the legal system, the newly-founded People's Republic of China would "abolish all the laws, regulations and judicial systems established by the reactionary CNP's government, which were aimed to oppress people and build up new laws, regulations, and judicial systems to protect people".[287]

According to the CCP, the old laws and judicial system were corrupting and backward, and had to be abolished, while the new laws and the people's judiciary were in line with the advanced socialist civilisation that was inherent in the ideology of the CCP. The destruction of the class structure by Marxist legal theories had reinforced a belief that there were no connections, inheritance or reference points between the old laws, the judiciary and the new ones, from the standpoint of substantive and procedural law, the legal spirit or the legal technique.

Thus, the legal system of the PRC was established on the basis of abolishing all legal heritages. Why was this so? What was in those leaders' minds when making such a decision? Did they believe that the cost of abolishing all of the rules functioning in the society would be smaller than establishing new ones on the old grounds? Judging from present points of view, we can see that the practice of abolishing all old laws and the judiciary system was simplistic and foolish. It stressed the class nature of law and the judiciary, and ignored their social nature and their function as a means of keeping society together and maintaining harmony. The decision to abolish all old laws

[287] Xu Congde, *Chinese Constitutional Textbook* (1994)51.

and the judiciary established a new legal order in a totally new social and cultural environment.

This approach can be better understood by examining the workings of the CCP in the international and domestic political context of the time. The founding of the PRC in 1949 was a direct result of the CCP's victory in the Chinese Civil War. Additionally, following World War II the Socialist bloc was well established. The Socialist Soviet Union, as a leader of the Socialist bloc in the international society, had provided great help to the CCP during the process of its early development. Mao Zedong, former supreme leader of the CCP, believed that Marxist theory and the Soviet Union's socialist system could provide theoretical guidance and systemic model for the future of China. This classical Marxist point of view saw the laws and the judiciary from old China as exploiting the people; they were viewed as the tools of oppression of the exploiting class. Thus, the abolition of these laws and the judiciary was seen as imperative. The leaders at that time were young and full of energy; they had already overthrown an old political regime, and wanted to build up a new one on its ruins.

The new judicial system of the CCP has been in operation for more than half of the past century. During this time, the Chinese people have been involved in many brave struggles and have dreamt of a modern and independent judicial system. This chapter will explore the rough path that the Chinese people have trodden in the pursuit of this dream, and will examine the innumerable hardships, progresses and retrogressions they have experienced.

A. The institutional background of the current Chinese judiciary

The current Chinese judiciary system was formed under the special institutional arrangements in China at the time that differed both from the West and from other socialist countries. The unique characteristic of China was that of a country with a strong externally inspired driving force to modernization. China had opened its door to the outside world and had begun the process of modernisation, a process that was halted by the man-made interference of the revolution. Under these circumstances, Chinese society was shaped into a unique institutional structure and dominative model, and the people's behaviours and ideas adapted to the new realities. Many scholars, including Chinese scholars, view China as a developing nation and ignore the special circumstances that led to the development of the Chinese judicial system. They do not fully understand, nor can they make sense of, the Chinese social system, as they do not take into account the social and political context of the time, circumstances that are crucial in comprehending the current Chinese judiciary system.

After 1949, China closed its doors to the modernised world and moved towards self-isolation once more. This self-isolation was an important factor in the development of contemporary China. From 1949 to 1979, a new institutionalised civilisation was formed and developed in a period of great prosperity. It could even be said that a new "tradition" had been formed, because this self-isolation transformed the older generations, poisoned the younger generations and also impacted on the children, shaping their behaviours, conduct, values, and even the way they thought. Its influence has been extremely deep and far-reaching in Chinese society.

The mainland of China began a process of self-isolation in 1950, and had achieved that state by the early 1960s. Under this condition of self-isolation, China developed a special institutional arrangement which began in the late of 1950s, early 1960s, and ripened into maturity in the mid-1960s. The characteristics of the institutional arrangement were as follows:

1. The economic system: a strict planned economy

A planned economy is one where the production and the distribution of goods and services are directed by a state plan. This style emerged in the former Soviet Union and other eastern European socialist countries. Under this style of economy, the levels of industrial and agricultural developments are higher than those under a traditional natural economy, although the general level of development is inferior to those of market economies.

With the commencement of China's self-isolation, the CCP completely destroyed private ownership. Barely three months after the founding of the PRC, the CCP called for the elimination of the landlord class in the countryside as part of its nationwide land reform program. The party's slogan "land to the tiller" indulged the selfish side of the landless peasants and encouraged them to struggle with the landowners by whatever means possible and to disregard the moral implications of their actions. The land reform campaign aimed to eliminate the landlord class, and classified the rural population into different social categories. Twenty million rural inhabitants nationwide were labeled as "landlords, rich peasants, reactionaries, or bad elements." These new outcasts faced discrimination, humiliation, and a loss of all civil rights.

Even so, for the owners of the newly acquired land, the good days of "land to the tiller" were short-lived. Within two years, the CCP imposed a number of practices on the farmers such as mutual-aid groups, primary cooperatives, advanced cooperatives, and people's communes. Using the slogan of criticising "women with bound feet" – i.e. those who were slow-paced – the CCP drove and pushed,

year after year, urging peasants into socialism. With grain, cotton, and cooking oil placed under a unified, nationwide procurement system, the major agricultural products were excluded from market exchange.

Meanwhile, the CCP wanted to eliminate the national bourgeoisie who owned capital in cities and rural towns. While reforming China's industry and commerce, the CCP claimed that the capitalist class and the working class were different in nature: the former were the exploiting class while the latter were the non-exploiting and, even, anti-exploiting class. According to this logic, the capitalist class was born to exploit and wouldn't stop doing so until it perished; it could only be eliminated, not reformed. If the capitalists and business owners surrendered their assets to the state and supported the CCP, they were considered to be just a minor problem among the people. If, on the other hand, they disagreed with or complained about the CCP's policy, they would be labeled as reactionary and become the target of the CCP's draconian dictatorship. During the reign of high tension that ensued during these reforms, capitalists and business owners surrendered all of their assets, and in doing so allowed the CCP, in just a few short years, to completely eliminate private ownership in China.

The CCP then adopted the economic model they had been planning since the early 1950s. This system's model was based on the collectivisation of agriculture, the nationalisation of private industrial and commercial enterprises, the development of a state-owned economy, and the implementation of a highly centralised system of production and distribution. The original intentions of this system's designers were probably good, however in practice they had ignored the social and political conditions in China at the time. As a result, politics and the economy were mixed and the economy became a handmaiden to politics. Under these economic conditions, private law, which regulated the horizontal economic relations among the people, was negated. Additionally, the administrative orders, regulations, and instructions that were designed for the implementation of the 'top to bottom' economic plan and distribution system became highly developed. Under these conditions, the development of a "rule of law" system became impossible, and a simple "legal system" was considered a hindrance. As a result, a system of outright "rule of man" emerged in socialist China.

2. The political system: the dictatorship of a single party

Self-isolation allowed the CCP to establish a highly centralised society.[288] Unlike the CCP, non-communist countries, even those suffering under rigid totalitarian rule and a dictatorship, often allowed some degree of self-organisation and individual self-determination. In ancient China, the society was, in fact, ruled according to a binary structure. In rural regions, clans were the centre of an independent social organisation, while urban areas were organised around a guild; the top-down government did not extend below the local county's level. But the CCP regime eradicated any forms of social organisation or any elements independent of the Party and replaced them with highly centralised power structures from the top down.

Therefore, the CCP became the sole political authority,[289] and became the centre of the whole social institutional arrangement.[290] The CCP established formal (through formalistic elections within the Party) and informal (appointed by the higher levels of the party) organisations within all state-owned enterprises, schools and universities, the military and the people's courts, state organisations, as well as various other levels and walks of life in the country. From the central to the local, every administrative level had been established as a professional committee of the CCP. The committee controlled all of the state agencies and social organisations including the judicial organs at the administrative level. In this way, the CCP was able to exert total control over every aspect of society. In the countryside, there were the CCP branches in every village; in urban areas, branch offices of the CCP were found in every administrative office in every neighborhood. In the army, legislatives, governments, judicial organs and enterprises, the CCP branches reached to the very roots. Absolute monopoly and exclusive manipulation were the measures that the CCP used to maintain this social structure. The Chinese constitution euphemistically termed this phenomenon as "persisting in the leadership of the CCP."[291] This system meant that all of the country's resources, politics, economics, cultures and ideologies were monopolised by the CCP through the state organisations. Although the CCP extended everywhere and controlled everything, nobody has ever seen the CCP's accounting records for the state, local governments, and enterprises. From the central government to the village committees in rural areas, the municipal officials were ranked lower than the Communist Party's cadres, therefore the municipal governments had to follow instructions from the Communist Party committees at the same level. The Party expenditures were supplied by the municipal units and accounted for in the municipal system.

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[288] Sun Liping, Chinese Social Constriction's Transformation, *China strategy and Management* (2001) 36.
[289] The CCP now has more than 60 million members in more than 3 million grassroots organisations. See The News Centre of Chinese Internet, The Chinese Communist Party, <http://www.china.com.cn/zhuanti2005/node_5225772.htm> at 9 September 2006
[290] For example, there are five stars on the national flag of the People's Republic of China, which symbolise the CCP's leadership. The CCP lead the Chinese people – the big star represents the CPC and the four small stars that surround the big star are the Chinese people (works, peasants, soldiers and businessmen).
[291] *Constitution of the People's Republic of China* (1982), Preamble.

When criticised for being dictators, the CCP officials would often retort with something along the lines of, "You are right, that is precisely what we are doing. The Chinese experience accumulated through the past decades requires that we exercise this power of democratic dictatorship. We call it the 'people's democratic autocracy.'"[292]

3. The social system: reunified society and the units[293]/residential registration system

a. The society was integrated.

The self-isolation of China effectively destroyed Chinese history, and allowed the CCP to reorganise and consolidate Chinese society. Everyone and every lawful organisation were reordered by a powerful consolidated force, and the structure of the entire society was reformed as a military system. The mesosphere of the society was dissolved in such social structure.[294]

Chinese society was not "growing up", it was "built up". As the founder of this society, the CCP infused its own past experiences, lessons, structures and operational rules like a genie into the society so that everyone and everything would share its qualities. The primary principle of this society was that the CCP was the leader of everything and the lower ranks had to obey the orders of the higher ranks while the whole Party obeys the orders of the Party's Central Committee. The focus of society was the combination of the party, the military and the administrative powers into one powerful summit organisation that had possession of absolute leadership. This authority was able to direct everyone and every organisation within the society. It managed the social life of the people and controlled the transmission of messages and ideology.

b. The units system.

In contrast to the whole country, which was highly centralised under the CCP leadership, there were also many isolated units within the nation. Units were the cells of contemporary China. They were a basic style of social organisation and a basic module of people's social behaviour. In contemporary China, entire lawful organisations, including the party's organisations, governmental agencies, judicial organs, factories, stores, banks, schools, institutes, hospitals, theatrical companies, labor unions, women's associations, young leagues, even churches and religious organisations, were all

[292] Mao Zedong, *Taking about People's Democratic Dictatorship*, Selected Works of Mao Zedong (1966), vol 4, 359.
[293] In this context, the unit is a term in China's society which translates from Chinese "单位" (Dan Wei).
[294] Li Qiang, Contemporary Chinese Social Delamination, *Sociology Study* (1993) vol 5, 4-5.

units. Every unit had a rank in accordance with military and administrative structures and the neighbourhood residents' committees in the urban areas and the production teams in the rural areas were "quasi-units". Everyone had to ultimately belong to one unit. It was possible for a person to spend his whole life in one unit, or to be transferred to another unit once given the relevant permissions.[295] Every unit had a fixed position in the state structure. In virtue of that, every unit was an extension of the state authority,[296]

The whole society ran relying on the performance of the state authoritative system and the units were merely internal organisational styles of this system. Therefore, all units possessed the same internal structure and adhered to the same rules of operation. Each unit had the two main functions of political and the social security, outside their own professional functions. Whatever the specialised field, each unit had the same responsibilities and organisational systems, which included "the office of the Party committee", "the political department", "the propaganda department", "the security section" and "the personnel department". These organisations were ranked according to their status in society, from the highest authority of the CCP to the bottom of the social grassroots organisations. They all obeyed the unified direction of the CCP, and contributed to the running of society as well as the transmission of orders to the lower levels and the transmission of messages to the higher levels. Each unit had the duty to provide their members with housing, medical care and provisions for retirement. The CCP controlled the units through monopolising and controlling resources and benefits, and therefore controlled the whole of society. Similarly, the units controlled the people by monopolising resources and benefits. Therefore, the units submit to the country and individuals submit to the unit. The CCP attached itself to every single unit and cell of Chinese society as tightly as a shadow following an object. It penetrated deeply into every capillary and cell of the society with its finest blood-sucking vessels and thereby controlled and manipulated the Chinese people.

Through the unit system, the CCP's control of society was all encompassing. There was a household registration system, a neighborhood residents' committee system, and various levels of party committee structure. Party branches were established at every level of the company and every village had its own Party branch. The CCP also designed a series of slogans for each unit, such as "Guard your own door and watch your own people", "Stop your people from appealing" or "Resolutely implement the system to impose duties, guarantee fulfillment of duties, and ascertain where the responsibility lies. Guard and control strictly. Be serious about discipline and regulations

[295] Ibid.
[296] Lu Fen, The Unit, a Special Social Organizational Style, *Chinese Social Science* (1989) vol 1, 71-88.

and guarantee 24-hour preventive and maintenance control measures."

c. The residential registration system.

In order for the CCP to effectively control society, they set up an unfair classification system, known as the residential registration system, which indicated people's status. Firstly, the system classified Chinese people into either rural or non-rural populations, usually based on birth. The rural population, which accounted for 82% of China's population in 1982,[297] was the lowest class. They had no access to public medical insurance, no retirement pensions, and no enjoyment of public welfare, nor were they able to obtain bank loans. The employees in non-rural populations were then divided into the cadres and the workers, depending on the person's education and job function. Once a person's status had been determined, it was almost impossible for them to improve their position.

Cadre referred to a status category and, in fact, a special community developed after 1949 that were regarded as the "framework" and the "nerve" of society. Cadres, of which there were 30 million in 1984, represented only one quarter of the non-rural population. The cadre's role in society was to uphold and transmit messages.[298] Cadres were people who had joined the "work of revolution" at the right time, they were people who had been promoted to cadres in the army, or graduated from institutes and recruited by the units according to the state quota. There were levels of rank within the cadre that were uniform across the nation and determined their economic and political treatment, from standards of welfare to standard of housing. The cadres were managed uniformly by the CCP committees at different levels, and they could be allotted and transferred nationwide according to the wishes of the CCP without any regard for their profession or occupation.

The Chinese judiciary developed in the political and economic atmosphere mentioned above. The people's courts at all levels were units, and the judges and other employees working in these courts were cadres.[299] Because the CCP enjoyed absolute leadership in the political and legal spheres, they developed and established the political and legal committees that would guide the judicial system. Meanwhile, the CCP also set up political work departments in the people's courts at all levels to affirm their leadership and power.

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[297] Li Dun edited, *Legal Sociology* (1998) 594.
[298] Ibid 704.
[299] Sun Liping, Chinese Social Constriction's Transformation, *China strategy and Management* (2001) 39. Li Dun edited, *Legal Sociology* (1998) 707.

4. Uniform climate of opinion and ideology

For the construction and maintenance of China's self-isolation, the CCP banned all popular media, and unified the people's opinions and ideologies to coincide with the Party's own opinions and ideologies. Thus, the culture had been cut off somewhere between the traditional and the contemporary China. Due to the CCP's inherent ideological opposition to traditional Chinese culture, the CCP devoted the nation's resources to changing China's traditional culture and infusing it with communist theory and ideology. To gain and maintain power in China, the CCP first had to plant its thoughts on Chinese soil, as Mao Zedong claimed, "If we want to overthrow an authority, we must first make propaganda, and do work in the area of ideology."[300]

Everything the CCP did serve its political purpose. In order to seize, maintain, and consolidate its governance of society, the CCP replaced human nature with the Party nature, and the Chinese traditional culture with the Party culture. The Party's complete domination over society can be compared to a hydraulic system in the way that it relied on high pressure and isolation to maintain its state of control; even one tiny leak could cause the whole system to collapse. The media was regarded as the tongue of the Party, and so the CCP's propaganda unit strictly controlled the media at all levels. In this way, the CCP created an isolated monopoly built on its theories and ideologies and crushing the people's freedom of thought, speech, association, and belief.

B. The judiciary from the founding of the PRC to the end of the "Cultural Revolution"

Against the previously outlined social and political backdrop, the development of the judiciary from the founding of the PRC to the end of "Cultural Revolution" can be divided into four periods:

1. The first period, from 1949 to 1954, focussed on the basic creation of a legal and judiciary system in socialist China

In the early years of the founding of the PRC, the newly born country was confronted with severe political and economic challenges, as well as the military activities of the Civil War. Thus, to the new political regime, it was important to establish a legal system, to restore the national economy, and to consolidate their political power. The new legal system and judiciary had to adhere to the political requirements in this period of social transition. The existing legal establishment was

[300] Mao Zedong, *Speech at the Eighth Session of the Tenth CCP Plenary Meeting (1962), Hu Sheng (Editor in chief), The 70 Years of the CCP* (1991) 163.

abolished and the old concepts of the law and the judicial working style were seriously criticised. Establishing a clear line between the new legal system and the old one was considered to be crucial politically.

A socialist legal system was then under construction. This system focused mainly on the consolidation of the new political regime, starting land reforms, developing the economy and restoring social order. At this time, the CCP abolished all laws and the judiciary system of the CNP government, and set up a people's judiciary, where the policies of the CCP directed the system.[301] The judges and other legal employees who had been employed under the CNP government lost their professional qualifications in the new society.

In 1949, the CCP rebuilt the courts and had many army officers and party cadres transferred to the courts as judges. In 1951, there were around 28,000 judicial cadres including 6,000 judges from the CNP system in the courts. In the same year, the CCP began their judicial reforms, and all of the 'old' legal persons were removed from the courts.[302]

2. The second period, from 1954 to 1957, was a period of little development

The first constitution of the PRC was issued and came into force in 1954. To a great extent, it took as its model the socialist constitution of the Soviet Union. The stated aim of this constitution was to rely upon governmental institutions and social forces, to guarantee the abolition of the existingt oppressive system and to establish a socialist society through socialist industrialisation and reform. Along with the constitution, in this period the following laws were passed that together constituted the basic structure of the legal and judiciary system: the Organisational Law of the National People's Congress, the Organisational Law of the State Council, the Organisational Law of the People's Courts, and the Organisational Law of the People's Procurators. Some modern judicial principles, such as judicial independence and the view of every citizen as equal before the law, were accepted in these laws.[303] However, the courts were basically designed as, what is referred to in China as, 'quasi-military units', which were under the strict control of the CCP.

3. The third period, 1957-1966, was the period of legal nihilism, which interfered severely with the legal and judicial development and generated serious social consequences

[301] Directive on the Abolishment of the Code of Six Laws of the CNP and the Establishment of the Judicial Principles in the Liberation Areas of the Central Committee of the CCP (1949). The Common Program of the Chinese People's Political Consultative Conference (1949), Article 17.
[302] Li Dun Edited, *Legal Sociology* (1998)706.
[303] Zhou Yezhong, *Constitutional Law* (2000) 189 and Zhang Baifeng, *Judicial System in China* (2000) 68.

In 1957, with the basic fulfillment of the socialist ownership reforms, the CCP adopted their planned economic system in the state economy, started the single party dictatorship in state politics, and established the residential registration system. From the end of 1957, a severe leftist ideology emerged in Chinese society, which served to strengthen the CCP's ruling authority. This movement, referred to in China as the 'anti-Rightist' movement, began to gain momentum and brought about the trend towards personal arbitration and the rule of man. A single party dictatorship replaced all semblance of democracy that existed before 1957. Since that time there were definite ups and downs in the economic development of China, however, in legal development there were only downs. The "Anti-Rightist" movement basically neglected any type of legal and judicial system. For example, roughly a quarter of the judges and judicial personnel working in the courts were labeled as "Rightists".[304] Additionally, the modern legal principles and systems that had been stipulated in the constitution were regarded as "bourgeois", and so became the target of criticism and were eventually abolished. Since this time, the judiciary has been almost non-existent in China.[305]

After the "Great Leap Forward" movement, China's leaders attempted to develop the national industry and agriculture at a rapid pace. The people's communes system, which was introduced all over the country, ignored the real living conditions, and what had started as an economic movement rapidly developed into a political one. This movement affected every aspect of social life, and especially affected the operation of the legal and judicial system. In many places, the public security, procurators and the courts were combined into a ministry named the Ministry of Public Security, Politics and Law. Additionally, the People's Mediation Committees and the Committees for Public Security were combined under the one organisation known as the Committees of Mediation for Public Security and Dispute. Special courts for railway and maritime disputes were eliminated. In 1959, the Ministry of Justice and the Bureau of the Legislative Affairs under the State Council were abolished, which resulted in the abolition of the Justice Bureaus in every province, autonomous region and municipality.

The Fifth National Judicial Conference took place on February 1960 and merely continued the work of the "anti-Rightist" movement by proposing that people's judicial work must have an 'overall leap forward' so that 'when there is case it should be dealt with, and when there is no case, the people should go to work and produce something'[306]. Under this kind of social atmosphere, the legal and

[304] In 1954, there were 41483 judicial officers in the courts, but in 1958, after the "Anti-Rightist" movement, they were reduced to 32058. See Li Dun edited, above n 11, 707.
[305] Zhang Baifeng, *Judicial System in China* (2000) 22 and Ye Xiaoxing, *Chinese Legal History* (2000) 327-342.
[306] Zhang Baifeng, *Judicial System in China* (2000)23.

the judicial system actually became meaningless. When the Cultural Revolution started in 1966, Chinese society had all the conditions for a revolution; there were no political systems to check and balance personal will, and there was no legal and judicial system to control the acts that violated citizens' rights.

4. The Fourth Period, 1966 to 1976, was the time of Cultural Revolution

At this time, the legal and judicial system ceased to exist; the courts had been under military control since 1967, most of courts' personnel were sent to rural areas for 're-education', and others were transferred to other organisations. The committees under the military's control played the role of judiciary during the Cultural Revolution.[307]

A review of the conditions of the legal and judicial systems before the Cultural Revolution may assist in understanding why the Cultural Revolution, started by just one man, could have had such a profound affect on almost everyone.

Firstly, in Chinese society, as it stood then, individuals had almost no concept of personal legal rights. The individual was not the rights holder, they were the 'Red Guard' of the 'great leader'[308], and the subjects or instruments for an abstract but great goal. The general public was made to disregard what their brains told them – they did not even ask questions when the President of the State, who was a major contributor to the first constitution, was thrown into jail without any judicial procedure.

Secondly, at the time, the political order had totally replaced the legal order. During the 20 years between 1957 and 1976, the NPC, as a legislative organ, was unable to take the responsibility of acting according to the legal procedure stipulated in the constitution. For instance, for the 10 years following May 1966, when the Cultural Revolution began, the Third Session of the NPC could not hold its regular meeting, despite the constitution stipulating that it should hold a conference annually. The only law made during the 10 year period of 1958 to 1967, was the Platform for the Development of the National Agriculture. The Fourth Session of the NPC in 1975 amended the constitution passed in 1954, and issued a new constitution with only 30 articles. The 1975 constitution deleted almost all of the modern legal and judicial principles, and reduced the articles

[307] Jian Hua, *Jianghua Judicia Papers* (1989) 13-14.
[308] Red Guard was paramilitary units of radical university and high-school students formed during the Chinese Cultural Revolution. Responding in 1966 to the Great leader Mao Zedong's call to revitalize the revolutionary spirit of the Chinese Communist Party, they went so far as to attempt to purge the country of its pre-Communist culture. Gao Gao &, Yan Jiaqi, *The 10 Years History of the Culture Revolution* (1986) vol 1, 159.

on citizen's rights and duties down from 18 to 4. 'Taking class struggle as the key link' and 'proletarian dictatorship'[309] became the core content of social political life. Aside from the constitution of 1975, the sate legislature had not made any laws at all during those ten years; the laws made before had become empty words on paper. People were used to looking for their rationales from Marxist theories when faced with one political movement after another, and they thought that the theories that had been completely dogmatised could provide reasonable interpretation for people's unreasonable activities. 'It is not wrong to rebel, it is a contribution to the revolution' became a slogan. Class and class struggle were the 'key link' and everything else was subsidiary[310].

Thirdly, the law and judiciary had no authority at all to prevent or challenge those activities at the time. In the Chinese society, law and the judiciary were subordinate to politics and was the means for 'dictatorship'. People could not protect themselves through legal means, and therefore the best way to protect one's self was to participate in the revolution more radically and promptly than others so as to become a part of the revolutionary force instead of mere objects the revolution.
Fourthly, and possibly most importantly, people did not have any property to protect at that time. To be poor became something to be proud of; revolution was the only thing which could give those interests. 'The poorest will make revolution'[311] might be one of the basic principles in political economics. Although many people did not get any interests out of the revolution, and in fact most lost freedom and rights, it was correct to say that most people who took part in the revolution were hoping to gain some political interests. When some Asian countries and regions were developing at a high pace both legally and economically, China was going in the opposite direction. The consequences were comprehensive: political life was characterised by personal autocracy, social life barely existed, and the national economy went to the brink of bankruptcy.

5. Conclusions regarding the Chinese judiciary before 1966

Due to there were no legal and judicial systems in China at that time of Cultural Revolution, below are some general conclusions regarding the Chinese judiciary before 1966.

Firstly, China was under the guidance of Marxist-Leninist ideologies, which stressed that the judicial systems represented the will of the ruling class in a class society, and they were instruments

[309] *Constitution of the People's Republic of China* (1975), Preamble.
[310] The Research Office of the Party's History of the Central Committee of the CCP, *The Brief History of the CCP* (2001) 121.
[311] Mao Zedong, Analysis of the Classes in Chinese Society, *Selected Works of Mao Zedong* (1966) vol 1, 2.

for the ruling class to oppress the governed class.[312] Under that legal ideology, there was a clear negative attitude towards the modern judicial system and the legal cultures of Western countries. When designing the legal and judicial systems in China, therefore, the differences between socialist China and Western capitalist countries were greatly stressed. For instance, some basic modern legal concepts, such as 'public law', 'private law', 'rule of law', 'equality before the law' and 'legal person', were criticised because they were regarded as the way in which the capitalist countries cheated the proletarian class. Lenin's theory that the basic mission for a socialist legal system was to consolidate the proletarian dictatorship and to suppress the enemies of socialism, was widely accepted. It follows then that the concept of judicature was replaced, and the criminal trial became the principal role of the judiciary.[313]

Secondly, the former Soviet Union was taken as a model and therefore the socialist characters of the state where emphasised. The phrase 'With the report of the first cannon during the October Revolution, it brought us Marxism and Leninism'[314] expressed fully the sense of respect on the part of the CCP towards former Soviet Union. The Chinese revolution and the Soviet Revolution shared the same character and the same goal, thus enabling the two to find common ground in terms of legal ideology. In the early 50s and 60s, legal education in China fully adopted the guidance of Soviet legal experts. China not only sent a great many students to the Soviet Union, but also invited Soviet legal experts to come to China to teach. The law schools even taught directly from Soviet textbooks in certain subjects.[315]

Thirdly, a strict system of planned economy, with administrative orders managing all the economic activities was practiced. The judicial system did not play a role in the economic activities.

C. The Judiciary Development in the Phase of Reform and Opening up since the 1980s

Mao Zedong's death and the destruction of the 'Gang of Four'[316] in 1976 instigated the end of Cultural Revolution. The lack of a legal framework meant that the destruction of the 'gang of four' did not occur in an open legal or democratic procedure. Thus, the non-legal and non-systematic

[312] The Translation and Edit Bureau of the Central Committee of the CCP: Marx & Engels, *Marx and Engels Collection* (1980) vol 1, 268, vol 3, 377-388; Lenin, *Lenin Volumes* (1959) vol 16, 292. Zhou Yezhong, above n 17, 43-44. Zhang Wenxian, *Jurisprudence* (1997) 49-53. Shen Zonglin, *Jurisprudence* (2000) 38-43.
[313] Li Dun edited, *Legal Sociology* (1998)707.
[314] Mao Zedong, On the People's Democratic Dictatorship, *Selected Works of Mao Zedong* (1966) vol 4, 360.
[315] Li Dun edited, *Legal Sociology* (1998) 713.
[316] The term 'Gang of Four' was used to describe a small group in the leadership of the CCP from 1974 -1976, which included Wang Hongwen, Vice Chairman of the CCP; Jiang Qing, Mao Zedong's wife and member of the Political Bureau of the CCP; Zhang Chunqiao, member of the Political Bureau of the CCP; and Yao Wenyuan, alternate member of the Political Bureau of the CCP. They were imprisoned in 1976, tried in 1980, and sentenced in 1981. Their sentences ranged from death (later commuted to life in prison) to 20 years in prison.

process that dealt with the "gang of four" itself was attended with uncertainty. While people celebrated the victory, they also began to think of ways to prevent such a tragedy from happening again. In the following two years, breaking away from the rigidity that had governed China for more than 30 years became the focal point of political struggle. There was a popular desire for democracy and the construction of an effective legal system. In 1978, the Third Session of the 11th Congress of the CCP was held, and from this historical event came the 'Adjustment from the Wrongs' and preparation for an 'Emancipation of Minds'[317] The declaration announced from this meeting became the clarion call for China's reform – the commencement of its opening up to the outside world, its economic development and the construction of a legal system.

China then opened the door to the West that had been closed in 1949 and continued the process of modernisation which had been halted by the revolution of 1949. The current Chinese judiciary was also to undergo reform and open up to the outside world.[318] The development in the past 25 years can be divided into three stages.

1. First stage, from 1979 to 1992, was the beginning period of this social transformation and the development stage of the judiciary

One sentence can be used to best describe the situation of China in the late 70s, and early 80s: a thousand things remain to be done; numerous tasks remain to be undertaken. In the economic field, owing to the damage brought about by the Cultural Revolution, the national economy was almost bankrupt. After so many years of economic success, China had become one of the poorest countries in the world. In 1978, the GNP per capita in China was only RMB 379 Yuan (US$ 54.00). In the political arena, the passing away in succession of the first generation leaders of the CCP left a vacuum in the political order sustained by individual political authority. Hua Guofeng, appointed by Mao Zedong as his successor, maintained his leadership for only two years with the support of the political authorities left over from his previous leaders. By December 1978, his historical mission had been completed. As a symbol for the transition from one era to another, the way Hua Guofeng moved toward the top of the power structure and disappeared quickly from the power peak was a miniature of the transition of Chinese politics and society. In the legal arena, an effort initiated by the Standing Committee of the NPC to sort out the laws and regulations passed before 1978 showed that of the 134 laws and decisions made, 111 were invalid, which means that 81% of the rules governing the country were invalid.[319] This fact also illustrates the position and role of law in the

[317] *The Communique of Third Session of the 11th Congress of the CCP (1978)*, <http://news.xinhuanet.com/ziliao/2005-02/05/content_2550304.htm> at 9 March 2006.
[318] Zhang Baifeng, *Judicial System in China* (2000)16-17. Zuo Weiming, *Chinese Judicial System* (2002) 15.
[319] Chinese Legal Development, *Legal Daily* (Beijing, China), 18 December 1987, 4.

society: in 30 years, the CPPCC, the SC, the NPC and its Standing Committee had only enacted 134 laws, and after the clear up, only 23 laws and regulations were still effective – these were the laws on which the legal reconstruction campaign would be based. In the judicial field, the military control in the courts ended, the people's court system was restored nationwide and cases that were decided during the Cultural Revolution began to be re-examined. In 1979, around 59,000 judicial personnel were transferred to the courts, but only 20% among them had worked in the courts before 1967.[320] According to the official statistics, during 1966-1976, 10% of the general criminal cases that were retrialled were found to have had an original wrong decision; 80-90% of the 100,000 anti-revolution cases sentenced in 1970 had been misjudged, and 63.6% of the 33,000 anti-revolution cases trialled during 1977-1978 were also found to have been misjudged.[321]

At that time, Chinese society was actually at a crossroads. The strictly planned economy and the rigid ideology had left a heavy burden on the Chinese society; the only way out of the deadlock was to reform. But at the same time, the reform initiative was confronted with many obstacles. In responding to the historical call, Deng Xiaoping the former powerful leader of the CCP, delivered an important speech on Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future.[322] In December of 1978, he proposed that the country could not develop if thought was rigid and the people blindly worshiped the authorities.

In order to emancipate people's minds, the democratic rights of the citizens had to be guaranteed. The rights stipulated in the constitution and the CCP's Program had to be guaranteed, and the legal system needed to be strengthened so as to guarantee these rights. The conditions in China at the time meant that the laws and the judicial system urgently needed to be formulated by society first. When the economic development of the country was confronted with pressures and challenges, the reforms began in the economic field. The legal reconstruction became the vanguard and the guarantee for economic reforms.

The 3rd Plenary Session of the 11th CCP's Central Committee at the end of 1978 put an end to the erroneous line of taking class struggle as the guiding principle, and put the focus on economic reconstruction. It abolished the planned economic system and carried out reforms in the rural areas by implementing a contract responsibility system, where remuneration was linked to output. After its initial success in rural areas, the reform was also carried out in the urban areas. From its

[320] Li Dun edited, *Legal Sociology* (1998) 711.
[321] Li Dun edited *Legal Sociology*, China Political and Legal University Press, 1998, pp. 708.
[322] Deng Xiaoping, Emancipte the Mind, Seek Truth from Fscts and Unite as One in Looking to the Future, *Selected Works of Deng Xiaoping* (1994) vol 2, 206.

experience of reform, the CCP realised that the development of a market-based economy was a precondition for modernisation. In response to this, Chinese economists put forward three different approaches: 'taking the planned economy as the leading force in the national economy and the market economy as a necessary complement to the planned economy', 'combining planned economy with the market economy', and 'taking the market economy as the leading force in the national economy and the planned economy as supplement to market economy'[323]. The above theories were confirmed by the state policies and China began making progress in its economic development through experimentation.

To be compatible with the economic development, China also began the reconstruction of its legal system. In the same meeting, the CCP put forward the slogan of 'advocating for the socialist democracy and enhancing the socialist legal system'. According to Deng Xiaoping, strengthening the democracy and the legal system would ensure an incident such as the Cultural Revolution would never occur again. In commenting on the historical lessons of the Soviet Union and the mistakes of Mao Zedong, Deng Xiaoping stated that, "Stalin severely destroyed the socialist legal system and comrade Mao Zedong said that this kind of incident could not happen in Western countries such as Britain, France and the United States. Though Mao had realised this, owing to the fact that he didn't solve the problems with the system of leaders as well as other problems that in fact existed, the Cultural Revolution, which brought ten years, of catastrophe to the country was not avoidable. This is a very painful lesson".[324] Furthermore, the goal for modernisation must be systemised and legalised. The history of the modernisation of China and other countries had demonstrated that whenever the law was respected, democracy was promoted, and once the country was in a stable position the national economy developed.

For the period after the Cultural Revolution, the gross violation of human rights was still in the minds of the Chinese people. They therefore demanded that a legal system be established to safeguard their rights and freedoms or, at least, for the social order of the 1950s to be restored as soon as possible. In 1978, Deng Xiaoping, the former powerful leader of the CCP, put forward the 'Sixteen-Characters Guiding Principle', which stated that 'there must be laws to go by, the laws must be observed, the enforcement of the law must be strict, and the lawbreakers must be prosecuted'.[325] This guiding principle was very important and had a profound impact on the legal reconstruction of China; it is still regarded today by the CCP as a guiding principle of the legal reconstruction. However, the formulation of "there must be laws to go by", as the guiding principle,

[323] Gu Jueming, *Socialism Market Economy* (2004) 150-198.
[324] Deng Xiaoping, ON the Reform of the System of Party and State Leadership, *Selected Works of Deng Xiaoping*, (1994)Vol 2, 333.
[325] Ibid 136.

was too general. As a result, the legal provisions made at the beginning were 'imperfect and need to be improved gradually in the future'.[326] During this period China revised the Constitution (1982), adopted the Criminal Law and the Criminal Procedure Law (1979), the Organic Law of the People's Court (1983), the Administrative Litigation Law (1989), the Civil Procedure Law (1991), and adopted some laws that directly regulated economic relations, such as the General Principle of Civil Law, Law on Economic Contract and Laws on Economic Contract Concerning Foreign Interests. Although the lawmakers tried their best to make these laws compatible with the country's economic needs, due to the various influences from the planned economy, some laws were found, shortly after their implementation, to hinder reforms and social development.

During this period, the judicial reconstruction progressed visibly. Firstly, the judicial personnel increased rapidly from 59,000 in 1979 to 234,000 in 1989.[327] Secondly, basic procedural laws were adopted and modern judicial principles and institutions were practiced in the people' courts for the first time since 1949.[328] Thirdly, new tribunals were set up in the courts to fit the needs of economic reform and social development. In 1981, the courts started to accept cases of economic dispute and also set up economic tribunals. These courts and tribunals received 19,000 economic cases in the first year and after 7 years, the number of cases increased 23.9 times reaching 459,000.[329] At the same time, the courts initiated complaint tribunals for re-examining cases that had been sentenced between 1949 and 1979. During the period 1983 to 1987, the tribunals retrialled 789,000 cases, 36% of which received a sentence reversal.[330] In 1989, the courts set up administrative tribunals nationwide to accept and trial administrative cases in accordance with Administrative Litigation Law. Lastly, the courts received and heard cases increasingly. In 1978, the courts heard 500,000 cases, and in 1988 this number was 2,357,000.[331]

In 1987, Zhao Ziyang, the general secretary of the CCP at the time, declared in the 13th national congress of the CCP that there were major problems with the current political model, and set about planning political reforms as well establishing a number of political institutions. After the meeting, Chinese political reforms began, this included judicial reforms. However, in June 1989, the Tiananmen Square Movement broke out and interrupted the process of political reform. Following this, the breakdown of the Soviet Union and other Eastern European socialist countries impacted

[326] Ibid 137.
[327] Li Dun edited, *Legal Sociology* (1998) 711.
[328] The Criminal Procedure Law (1979), Administrative Litigation Law (1989) and the Civil Procedure Law (1991) were adopted for the first time in the history of the PRC.
[329] Chinese Law Society, *Chinese Legal Yearbook* (1989).
[330] Li Dun edited, *Legal Sociology* (1998) 708.
[331] Research Office of the Supreme People's Court, 'New Development of People's Court', *People's Court Newspaper* (Beijing, China), 28 September 1999.

strongly on the CCP and caused the CCP to stop its political reforms, and even forbade the discussion of politics in public.

After all of the economic reforms and social developments it was discovered that the new judiciary system was not actually able to meet the reforms needs. Firstly, due to the lack of procedural provisions, many laws could not be used to bring a case to court and have it resolved. Secondly, the structure and management of the people's courts still basically followed the models of judicial design from before 1966. Thirdly, the main source of judicial personnel still came from the army – a great number of military officers were transferred to the courts as a president of the court, a chief of tribunal or a judge, according to their ranks. Finally, the model of political movement had been used as the style of adjudication.

After 1949, the reconstruction and consolidation of China was hampered by the political movements. In the early 1950s, these movements included the suppression of 'counter-revolutionaries,' thought reform campaigns, cleansing the anti-CCP clique headed by Gao Gang and Rao Shushi, and probing Hu Feng's 'counter-revolutionary' group, 'Three Anti Campaign', 'Five Anti Campaign', the further cleansing of counterrevolutionaries.[332] The courts had to make a concerted effort to trial some cases quickly according to the requirement of a special movement, and put other cases aside. For example, in 1983 China decided to crack down on serious criminals. The police, prosecutors and the courts devoted every effort to participate in the campaign, which was led by the committees of the CCP at all levels. In 1989, the courts also treated strictly those cases related to the Tiananmen Square Movement very strictly, on the party's instruction.

2. The second stage, from 1992 to 1997, focused on rebuilding the market economy and commencing judicial reforms

After 1989, Chinese reforms, whether economic or in other fields, came to a standstill. Conservative thought rose and tried to reverse the reforms that had been made. In the spring of 1992, Deng Xiaoping, supreme leader of the CCP at that time, made an inspection tour for restarting Chinese reforms; he strongly believed that China must continue to make reforms. In the same year, the CCP accepted Deng's idea, and for the first time, the CCP formally adopted the policy of building a socialist market economy system. The major debate at the time concerned whether the reforms and

[332] Gao Gang and Rao Shushi were both members of the Central Committee. After an unsuccessful bid in a power struggle in 1954, they were accused of plotting to split the Party and were subsequently expelled from the Party. Hu Feng, scholar and literary critic, opposed the sterile literature policy of the CCP. He was expelled from the Party in 1955 and sentenced to 14 years in prison. From 1951 to 1952, the CCP initiated the "Three Anti Campaign" and the "Five Anti Campaign," movements with the stated goal of eliminating corruption, waste and bureaucracy within the Party, government, army and mass organizations.

the development of a socialist market economy in China were compatible with the socialist principles. In response to this debate, the CCP confirmed the basic criterion put forward by Deng Xiaoping that 'this should mainly depend on whether it is conducive to the development of socialist production force, to the strengthening of the comprehensive national power of the socialist state, and to the raising of the people's living standards.'[333] This further strengthened and clarified the goals of reform, opening China to the outside world and aiding in the development of a market economy.

In order to suit the needs of the development of a socialist market economy, the Standing Committee of the 8th NPC was set the task of establishing a legal system of socialist market economy and to make legislative plans and suggest judicial reforms in accordance with this task.

During the terms of the NCP, 85 laws and 33 decisions on legal questions had been adopted.[334] During this period, with the establishment of the goal of building a socialist market economy and with the increased consciousness in serving this goal, the quality of legislation improved markedly and greater achievements were made in the reconstruction of the legal system. In this time, China began to accept some principles of the rule of law, not only in its economic, administrative and criminal legislation, but also in its legal enforcement and judicial systems. However, the formulation of the legal system of a socialist market economy as a guiding principle for legislation, although more specific and clear than the formulation of "there must be laws to go by", was apparently not comprehensive enough. Moreover, there were different views among the legal scholars and the legal workers concerning the scope of the legal system of a socialist market economy, which inevitably affected the people's general understanding as well as the process of legal reconstruction.

Responding to the call for building a socialist market economy, the the Supreme People's Court started to map out a plan for judicial reforms and for putting them into practice. Initially, the people's courts were set up in the economically and technologically developing areas. Following this, a trial mode for civil and economic cases was formed, which stressed the parties' burden of adducing evidence as opposed to the primarily inquisitive nature of the previous people's courts. Next, the mediation centre for economic disputes, which started in the courts of developed areas, was spread as the new mode of improving the efficiency of commercial dispute resolution. Following this, the people's court practices of record keeping was made uniform and enforced

[333] Deng Xiaoping, Excerpts from Talks Given in Wuchang, Shenzhen, Zuhai and Shanghai, *Selected Works of Deng Xiaoping* (2002) vol 3, 372.
[334] Tian Jiyun, *Working Report of the Standing Committee of the National People's Congress*, *People's Daily*, 25/03/1998.

nationwide. Finally, new tribunals, such as the tribunal of intellectual property and the tribunal of bankruptcy, were set up. The most significant event was the adoption of China's Judges' Law in 1995. The law outlined the qualifications, responsibilities, rights and duties of Chinese judges, as well as the process of selection, appointment and removal.

3. The third stage, 1997 to the current date, is the middle period of this social transition and the judicial modernisation, and is also the middle stage of the whole reformative process

1979 to 1997 was the beginning period of Chinese reform and social transition. After facing a serious 'crisis of legitimacy,'[335] the CCP embarked on a process of reform and opening up in the 1980s, in order to remain in power. For this purpose, the CCP chose only to reform the economic system while maintaining the political system. However, has the CCP's eagerness for quick success placed China at a disadvantage, termed by economists as the 'curse of the latecomer'?

The concept of the 'curse of the latecomer', or the 'latecomer advantage' as some scholars term it[336], refers to the ability of underdeveloped countries that are so-called latecomers to modernisation, to imitate already developed countries in many aspects. The imitation can take two forms: omni-imitating, which includes economic, political, legal and social systems, or just imitating the technological and industrial models. Imitating the social system is usually difficult as social reforms can endanger the vested interests of some social or political groups that already hold power in the society. Thus, underdeveloped countries are generally more inclined to imitate the developed countries' technologies. Although technological imitation can generate short-term economic growth, it may result in many hidden risks or even failure in long-term development. Over the past years, China's 'technological imitation'[337] has led to huge achievements, but it is important that they are not burdened with the 'curse of the latecomer.'

After 1997, the social transformations moved into the middle stage of the reform process. The CCP had placed too much importance on the maintenance of social stability and the single party dictatorship and, therefore, it still maintained the basic institutional arrangements in political and social control which were formed in the time of self-isolation. The CCP has not made enough effort to use the legal system as the tool to promote political reforms, and the transition from the rule of

[335] Ding, X. L., *The Decline of Communism in China: Legitimacy Crisis, 1977-1989* (1994) 1.
[336] Terutomo Ozawa, Veblen's theories of 'latecomer advantage' and 'the machine process': relevancy for flexible production, *Journal of Economic Issues* (2004) vol 1. Yang Li, *Economic latecomer confronted with curses* (2004) INSEAD <http://www.chinadaily.com.cn/english/doc/2004-05/08/content_328842.htm > at 16 May 2005.
[337] Steven White and Wei Xie, *From Imitation to Creation: The Worldwide Impact of China's 'Phase Five'* (2004) INSEAD <http://knowledge.insead.edu/abstract.cfm?ct=13306> at 18 May 2006.

man to the rule of law has been too slow. As a result, the judicial reforms have faced barriers that cannot be broken. One of the most serious consequences is the corruption that is currently taking place and receiving much public attention. The Chinese government needs to deepen its understanding, strengthen its self-consciousness and adopt decisive measures to avoid these consequences.

However, the CCP engages only in economic reforms, and not political reforms. The false appearance of an economy that flourishes in the short run has hindered the natural evolution of social systems. It is these incomplete reforms that have caused an increasing imbalance in Chinese society and sharpened social conflicts. The financial gains achieved by the people are not protected by a stable social system or a modern judicial system. This stage of the reforms has revealed extreme disparities between the rich and the poor, as well as social injustice and corruption, particularly judicial corruption. Further reforms have to face many different social interest groups that have entirely different opinions on the reformative direction that China should be heading, thereby making the process of reform and transition a difficult one.

For coping with the incredibly difficult challenge, the 15th National Congress of the CCP put forward the basic guiding principles concerning the economic, political and cultural development at the primary stage of socialism in 1997. It has more clearly emphasised the need to develop a market economy in China under socialist conditions and the need 'to further increase the level of democracy, to improve the socialist legal system, to administer the state affairs in accordance with the law, and to build a socialist state under the rule of law'. It recognised that 'to run the state affairs according to law, means that the people administer state affairs and manage economic, cultural and social affairs under the leadership of the Party through various channels and in various ways in accordance with the law, so as to ensure all works of the state are carried out on legal bases, to realise step by step the socialist democracy by system and law, to make the system and law not subject to change with every e shift of leadership, opinions or attentions of the leaders.'[338] It has also put forward the tasks of "strengthening the legislative work, improving the quality of legislation, and establishing a socialist legal system with Chinese characteristics by the year 2010".[339] This legal system will be an important part of the socialist state under the rule of law, and must comply with the principles of the rule of law. In 2002, China's entry into World Trade Organisation provided a much-needed outside impetus for China to adopt certain universally-

[338] Jiang Zemin, Working Report to the 15th National Congress of the CCP(1997), People's Publishing House Edited, *Compilation of the Documents of the 15th National Congress of the CCP* (1997)31. http://www.china.com.cn/ch-80years/lici/15/15-0/8.htm at 6 May 2005.
[339] Ibid, 33-34.

accepted legal and judicial principles, which will fundamentally change the legal and judicial systems. Currently, China's legal reconstruction and judicial modernisation are at the beginning of the third stage of development.

The CCP had also proposed that the party 'will lead people to accelerate the judicial reform so as to guarantee the fair and independent exercise of judicial power through the legal system'.[340] This was the first time that judicial reforms had been mentioned in an official CCP document, meaning that finally the highest level of authority in the country had accepted the idea of judicial reform. Following this, in 1999, the Supreme People's Court adopted "The Five Year Program for People's Court Reform (1999 – 2003)", and made great efforts to establish a just and equitable judicial system. The program pointed that "the people's courts' management institute and trial system have been experienced a serious challenge, because the social relationships have been changed that resulted in the people's courts facing a complicated situation. Face the challenge, the people's courts are no way out unless reform."[341] This led to some progress in judicial reforms as the national judicial examination was set up, judges now wear black judicial robes on the bench (as against military uniforms of the past) and a system of selecting presiding judges has been established.

As a response to the 16th National Congress of the CCP in 2002, which brought forward promoting judicial reform, the Supreme People's Court issued "The Second Five Year Program for People's Court Reform (2004 – 2008)" in 2005. In the second program, the SPC set up the missions and targets of the five years were "reforming and improving the judicial proceeding, reforming and improving the enforcement machinery, reforming and improving trial organizations, reforming and improving the judicial administrations, reforming and improving the judicial personnel management, reforming and enhancing the judicial internal and external supervision, constantly pushing the reform of the people's courts system and work machinery for building a modern judicial system to meet the requirement of the socialist country under the rule of law."[342]

When we have been examining the ten years' judicial reform from 1999 to 2008, we are able to find out that the judicial reform was a process of putting the two "reform programs" into effect, that is to say that what certain extent of judicial reform was to depend on what situations the two "reform programs" have been putted into effect. From the perspective of actual effect, as the results of the first five years program, the people courts achieved the separation of registration and trial, the

[340] Idid.
[341] The Five Year Program for People's Court Reform (1999 – 2003). *Bulletin of the SPC of the PRC (1999)*, p185.
[342] The Second Five Year Program for People's Court Reform (2004 – 2008).
http://www.dffy.com/faguixiazai/xf/200512/20051214221735.htm, 14 Dec, 2005.

separation of trial and enforcement, the separation of trial and supervision, trial function of the courts has been enhanced. As an important result of the second five years program, the Supreme People's Court took back the authority of death sentence review in the first day of 2007. Other results of the second five years program included adopting the Judge's Code of Ethics, improving transparency of trial procedure and judgment writing, as well as structural reform in the court for accepting nod hearing cases. Such reform measures not only went with the stream of Chinese social public opinion, but also answered for the basic rule of the development of judiciary, which is propelling the Chinese judiciary forward to modernization.

However, if the ten years judicial reform has been weighed up carefully by our powers of reasoning, we could find out that the most of the missions in the two "reform programs" were not fulfilled, [343] such as to strengthen independence and professionalism of judges, to promote judges' treatment and to enhance safeguard the financing of the courts. Many contents of the two "reform programs" were only to stop in the level of watchword[344]. Even some achievements that mentioned above in the judicial reform are only with a view to the technical level, rather than an institutional level. The main reason is that the immediate and director limitation of Chinese judicial reform is still the current structure of Chinese state powers.[345] The judicial power is under the control of the politics becoming a long – term prominent characteristic in China, and the working mode, which the CCP's committees in particularly the political and legal committees of the CCP (from the central to the local) have powers to approve the courts' judgement and to solve legal disputes, was established in1958[346]. In a high level meeting of the judicial reform, Xiao Yang who was the president and chief justice of the SPC at that time had a speech that specially distinguished between the Chinese judicial reform and the Western judicial independence, and reaffirmed the party's stand that all cadres[347] have been managed by the party. [348] In spite of that, the redeeming feature of the two "reform programs" is to grasp the essence of judicial reform and to note the orientation of the judicial modernization.

In line with the principles of the 17th National Congress of the CCP, the SPC issued "the Third Five Year Program for People's Court Reform (2009 – 2013)" in the early of 2010. The program points out that the first principle of Chinese judicial reform is to persist in the party's leading; the second principle is to persist in the characteristics of Chinese socialism that the judicial reform must be

[343] Zhang Qianfan, *The People's Court in the Transformation – Chinese Judicial Reform Review and Expectation*, Journal of National Prosecutors Collage, Vol.18 No.3, Jun 2010, p58.
[344] *The Current Situation and Expectation of the Courts Reform*, the Beijing News, 10 Jan, 2009, p1.
[345] Andrew Nathan, *China's Transition*, New York: Columbia University Press (1997), p239.
[346] Zhang Heng & Jian Fei, *The Personnel Chart of the CCP*, Chinese Radio & TV Press (2003).
[347] The Chinese judges are one part of the cadres.
[348] *China Legal Daily*, 06 Jun, 1999, p1.

under the guidance of Marxism and socialism legal ideas. The program also puts forward the "three supremacies", which are to treat the party's cause as supremacy, to treat the people's interests as supremacy and to treat the constitution and law as supremacy, being embodied in the judicial reform. [349] The "three supremacies" put Chinese judicial reform in a great quandary. Because the first of the "three supremacies" is to treat the party's cause as supremacy, it means putting the party's interests above the courts and laws. In fact, the important mission of Chinese judicial reform is to accomplish the judicial independence. But when we check "the Third Five Year Program for People's Court Reform (2009 – 2013)" against "the Five Year Program for People's Court Reform (1999 – 2003)" and "the Second Five Year Program for People's Court Reform (2004 – 2008)", we are able to discover that "the Third Five Year Program for People's Court Reform (2009 – 2013)" seems taking the road back, therefore the future of the Chinese judicial reform is in the balance.

D. The Basic Mission of the Legal and Judicial Reforms over the Past Years

The Chinese institutional arrangements have not changed dramatically and therefore the basic mission of legal and judicial reforms has had to comply with the position and the tasks of the CCP in past 25 years. Outlined below are the aims of the legal and judicial reforms according to the tasks in different phases of the CCP since 1980s.

1. Safeguarding the economic reforms

The reforms and the opening up of China to the outside world have been some of the greatest events in the late 20th century not only for China but for the whole world. The spiritual legacy left from the Cold War was that a country must pursue either a rigid, traditional socialist model, or a liberal, modern capitalist model. I think that the socialist system based on the model of the former Soviet Union did not have the flexibility for the kinds of real reform needed in China.

Thus, the CCP has chosen a different reform road from most Eastern European countries. First of all, the aim of the reforms in China is to improve the existing socialist system rather than to deny or overthrow it. Although the 30 years of socialism was accompanied by many mistakes and problems, China's self- isolation, and its political, economic and unique social structure have generated a common social ideal and common moral standard in the early days of the reforms. It is important, therefore, that the liberal and democratic problems associated with capitalism are avoided by

[349] The Third Five Year Program for People's Court Reform (2009 – 2013), http://www.court.gov.cn/spyw/sfgg/201002/t20100223_1776.htm, 23 Feb, 2010.

showing great awareness and effort in the process of the reform and development.

It is important that the reforms are carried out slowly and in an orderly fashion under the leadership and guidance of the CCP, and within the framework of laws and policies. Apparently, one side the CCP wanted to force the reform for remain its ruling validity; the other side the CCP also is afraid of losing its ruling power in the country due to the reform. Therefore the all reforms in China are under the control of the CCP strictly. Of course, from an objectivity point of view this kind of control is good to prevent social dislocation and conflict in the certain level, and also to meet Chinese society that is more consistent with top down reform due to the traditional culture. In the former Soviet Union and other Eastern European countries, reforms were put in place to weaken the leadership of the communist party, and eventually led to the collapse of the communist parties. But the history of China's reforms has been led by the CCP, and therefore if a particular reformative measure was not accepted by the CCP, it was impossible to initiate and implement. However, during the process of reform, the public has demonstrated great creativity, for instance the farmers themselves have started reforms in rural areas. Policies and laws of the government were confirmed shortly after those grass roots reforms, and this was the way that laws were universally accepted from the top down to the bottom.

Compared with the reforms in Eastern European countries, the CCP has focused first on economic reforms. When Eastern European legislators debated over democracy and the rule of law in the assembly, Chinese legislators were interested only in the 'safeguard and escort' of economic reforms. Analysis has shown that legislation on economic reforms has composed a great proportion of the entire legislative workload.[350] At the same time, the judiciary provides a service for economic developments one of its chief duties. The Party required that 'the courts must reinforce the judgment on economic cases', and 'the judicial organs must provide legal service for economic construction'.[351]

2. Attempt to establish and strengthen the authorities of the law and judiciary

China is a country with a long history of the 'rule of man'. In a certain sense, the establishment of the authority of law and judiciary, and thereby replacement of the 'rule of men' is the most important mission of the present day reforms. During the 25 year reform process, one of the most important aspects for legal reform was to break through the existing political, administrative and

[350] From 1979 to 1982, China adopted 300 laws and regulations, 250 among them were relative to economic relations. New Legislations in China, *Chinese Legal Daily*, 27 August1982, 11.
[351] Decision on the Economic Reform of the Central Committee of the CCP, *People's Daily* (Beijing, China), 20 December 1984, 1.

management system, and to establish and perfect a system based on the market economy, with a modem rule of law model. The efforts made on this aspect are described below:

a. Attempt to promote the authority of law and judiciary in social and political life.

There is still a debate taking place from the early 80s on whether the ruler's power is higher than the law. The background of the debate originated after the adoption and implementation of the 1982 Constitution. Many people, and even local officials, believed that the Constitution was nothing but a piece of paper and that even the county governor, who was at the bottom of the hierarchy, enjoyed a higher power than the constitution and the law. This may seem absurd, but it clearly shows the problems that most need addressing in the theory and practice of Chinese society.

Article 5 of the Constitution stipulates: 'The State sustains the unity and the dignity of the socialist legal system. All laws, administrative principles and local regulations cannot run in contradiction with the constitution. All governmental bodies and the armed forces, all political parties and social organisations, all organisations of the enterprises and institutions must abide by the law. All actions that violate the constitution and the laws must be under investigation. Any organisations or individuals should not have the privilege to surpass the Constitution and laws'.[352] In support of this provision, the Program of the CCP made a relevant provision that 'The party must act within the framework of the constitution and laws. The party must guarantee the legislature, the judiciary, the administrative organs, the economic and cultural organisations and the people's groups to actively initiate work, to work independently and responsively, to work coordinately and consistently'.[353] But having been through all of those political movements without any legal base, having observed the unlimited power of rulers, who would trust the authority of the Constitution, the law and the judiciary? Therefore, in Chinese society, building up confidence in legal and judicial establishment is a priority that must be addressed by the CCP, and efforts are needed to convince the people that they can trust the law and judiciary.

In order to establish the authority of law and judiciary, in China's case, the first thing that should have been done was to improve the relationship between the CCP and the law and judiciary. The way China was run; any challenges to the authority of the law and judicial independence came only from the CCP. This meant that the authority of the Party's policies and leadership was above the Constitution and the laws. Additionally, the authority of the Party's institutions and organisations

[352] *Constitution of the PRC* (1982), Article 5.
[353] *The Program of the CCP* (2002), General Provision.

were above the state legislative and judicial organs, which had been around for so long. This had many negative consequences in the Chinese society. In order for the Party to meet the needs of reform, as well as the needs for social modernisation, it must first respect the authority of the law and the judiciary, and it also needs to improve its leading role in a modern society. There is nothing more important than the commitment of the CCP to recognise the supremacy of the Constitution and law, as well as judiciary and to put this understanding into practice. However, China's current situation makes it almost near impossible to have the highest authorities as the Constitution, law and the judiciary.

b. Attempt to improve the relationship between the governments and the judicial organs, and to establish administrative authorities according to law.

Another challenge to the authority of the law and judiciary came from the executive powers. The expansion of the executive powers is common in modern countries and is means of controlling administrative power. For a long period of time in China, there were no uniform regulations and standards for administrative actions, no demarcation lines between different administrative powers, no unified procedure for administrative actions, and no legal action possible against public officials who violated the law, abused their powers or neglected their duties. The logical means of fixing this situation is by making the declared intentions of the rulers have the force of law. Lower level officials should act in accordance with the words or orders of their superiors.

After 1978, China began to pay more attention to their legislative standards, and tried to formalise its administrative organs and actions. For example, in 1979, the Organic Law of the State Council, the Organic Law of the Loca1 People's Congresses and Local People's Governments were re-formed, and a number of new laws and regulations were adopted for the purpose of controlling various administrative powers. The Constitution of 1982, stressed how important it was for the state administration to work in accordance with the Constitution and the law. This constitution stipulated that no laws, administrative regulations or local rules may contravene with the Constitution nor are any organisations or public officials considered a higher law than the Constitution.[354] It also stated that the people's courts exercise their judicial power independently, and are not subject to interference by any administrative organs.[355] The NPC and its Standing Committee enjoy the supervisory jurisdiction over administrative organs. The responsibilities and principles of the administrative organs and their officials were very clearly established. Until the early 90s, there

[354] *Constitution of the PRC* (1982), Article 5.
[355] *Constitution of the PRC* (1982), Article 126.

were more than 130 provisions scattered in different laws and administrative regulations stipulating that citizens could sue through a judicial procedure if their rights had been violated by administrative institutions or government officials. To make those provisions enforceable, the Administrative Litigation Law of the PRC was adopted and came into effect in 1991. It was the first time in Chinese history that the citizens had a legal procedure to follow if they felt their rights had been violated by officials. The State Compensation Law, the Law of Administrative Review, the Law for Administrative Punishment and other related laws were adopted and implemented soon after. These laws standardised the exercise of administrative power and also promoted judicial authority in Chinese society.

c. Attempt to normalise and adjust the market economy by judicial means.

The Chinese reforms started first in the economic sphere through the replacement of administrative orders under the planned economy with new laws. Since the late 70s this process of economic and legal reform moved along at a rapid pace, until an economic legal system based on the Constitution was created. In this system, the General Principle of Civil Law (1986), the Cooperation Law (1993), the Law on Chinese-Foreign Equity Joint Ventures (1988), the Law on Foreign Capital Enterprises (1986), the Contract Law (1999), the Banking Law (1995), etc., has led economic activities into the legal track and also has provided the basis for judicial work in the commercial sphere. China has also actively taken part in the economic globalisation process, and has participated in and ratified a number of international economic treaties. For instance, China is a part of the UNC, Convention on Contracts for International Sale of Goods[356], and a party to the Paris Convention for the Protection of Industrial Property[357]. The best example of China's part in world economics was their entry into the World Trade Organisation in 2002. Some of the provisions of these international economic agreements have also been absorbed into China's domestic legislation, and have become the standards for Chinese economic activities and the judicial work.

One of the biggest problems facing Chinese economic reforms has been the relationship between the government and enterprises. The 30 years of the planned economy have bound the enterprises tightly to the governments, so that the enterprises have almost belonged to the governments, and the governments have played the role of boss to enterprises. Governments appointed the leaders for

[356] *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature on 11 April 1980, A/Conf 97/18, Annex 1 (entered into force 1 January 1988).
[357] *Paris Convention for the Protection of Industrial Property of 20 March 1883*, opened for signature 20 March 1883, [1972] ATS 12 (entered into force 26 April 1970).

enterprises meaning that the enterprises had no autonomous power for management and no accountability either. It has been this way for so long that the state-owned enterprises are not as healthy as they could be. Separating the governments from enterprises, enabling enterprises to go on the market themselves, giving them the right to manage according to law instead of administrative orders has been a major problem that Chinese reformists have tried to solve.

d. To frame a legal system that provides guidance for all aspects of social life.

In the 1980s, the Chinese legislature announced that their major aim was to provide legal guidance for all aspects of life. In a 25 year effort, a legal system, with the Constitution as its guide, was put into place encompassing administrative law, civil law, economic law, marriage law, labour law, social welfare law, law for the protection of natural resources and environment, criminal law, procedural laws and military law. With the creation of rules to follow, the people were able to access the courts to seek justice. The methods for solving disputes had changed and had thereby changed the way people lived. Social disputes that had once been dealt with administratively were now solved using the law and the judicial process. Saying "Go to the courts" was once a negative statement, and those who had "been in court" were likely to be looked upon negatively. Now, however, people protecting themselves through the courts are regarded as heroes. The new laws and judicial system gave the people back the control of their own rights and provided them with a means to protect these rights.

E. Conclusion

China's society has, in the past 30 years, gone through unprecedented and profound changes with respect to its economic, social, cultural, political and legal systems. These changes have been assisting in the transition of Chinese society from a traditional society to a modern one, and are laying a foundation for democracy and the rule of law in China. Additionally, based on an analysis of the current conditions, it is possible to believe that China is moving towards the inception a modern judiciary system.

However, it is important to note that the reforms taking place in China regarding their economic, social, cultural and political systems will not necessarily lead China into a society ruled by the law. The current institutional arrangement in China is a strong barrier to these reforms. The rule of law and a modern judicial system have not been established completely and because of this China are still under a one-party dictatorship under the political supremacy of the CCP. As many western

scholars have realized that the current political and institutional arrangement of China and lack of civil liberties clearly stunt Chinese legal development. Stanley B. Lubman, a famous scholar of Chinese law in America thought that the judiciary is not independent, not when it comes to the Communist Party; this failing makes the Chinese legal system, not the rule of law. [358] Jean-Pierre Cabestan, another researcher of Chinese law, also thinks risks, setbacks and difficulties will continue to be present and prevent China from establishing a truly independent judiciary and the rule of law. A truly modern and independent judiciary in China can arise only if it can challenge the leading political role of the CCP.[359]

In Fact, for a long time, the challenges to the authority of the constitution and the law came mainly from the Party policies and officials. The Party's policies were considered to be more important than the constitution and laws and Party's institutions and organisations had more authority than the State legislative and judicial organs. This situation lasted so long that the consequences to society were extreme. As mentioned previously, under the one-party dictatorship system, no matter what the leadership party is, it is impossible to establish a true democratic constitutionalism and a rule of law society. Therefore, constitutionalism in China cannot be realised without serious reforms to the current institutional arrangements. In the past 30 years of reform and China's modernisation, profound changes have taken place in China with respect to the economic, social, cultural and political systems, and the conditions are ripe for further political and legal reforms – it is just up to China to make the most of its opportunities.

[358] Stanley B. Lubman, *Bird in A Cage: Legal Reform in China after Mao*, Stanford University Press, 1999, pp297. Another scholar of Chinese law in America, Randy Pereenboom, also has done many researches on Chinese legal reform. Interesting thing is that he thought China's "socialist rule by law" qualified to be call "the rule of law" or a "thin rule of law". See his book *Asian Discourses of Rule of Law*, Taylor & Francis, Inc., 2004.

[359] Jean-Pierre Cabestan, *The Political and Practical Obstacles to the Reform of Judiciary and the Establishment of a Rule of Law in China, Journal of Chinese Political Science*, vol. 10, April 2005.

CHAPTER 7: THE INTERGRADE: THE CURRENT CHINESE JUDICIARY BETWEEN THE MODES OF TRADITIONAL AND THE MODERN

China is currently moving towards modernisation and the legal and judicial systems are moving towards modernisation with it. The goal of modernisation has been pursued by generations of Chinese people. In the context of the Chinese people, modernisation is the 'collective good' that implies all things beautiful, and the modernisation of the legal and judicial system is a collection of all the 'good' among political formation for human kind.

There is no doubt that the rule of law is the legal system most suited to a modern industrial society. As an ideology of Western liberalism, it supports the development of capitalism in the position of 'law of reason'. The values of the rule of law, such as the law's supremacy over society, individual rights have priority over other social values and an independent judiciary, have a much greater humanitarian character compared to the values in traditional Chinese legal culture. The traditional values can be summarised as power is more important than the law, individuals are subordinates of the political authority, open inequality of legal rights and individual rights sacrificed in exchange for social harmony. However, for a country like China, which has a unique institutional arrangement, a population of 1.3 billion, 70% of which live in rural areas, social interests are multiple and the reasons are multiple too. The problems that need to be solved in the process of modernisation are much more complicated than other countries have experienced.

Therefore, modernisation is a very slow progress in China. Even though the advantages of modernisation are visible, the disadvantages obstructing the process also clearly exist. There are the traditional elements, in particular the institutional arrangement which was formed under the circumstances of the self-isolation after 1949 has existed stubbornly and had a strong influence on

Chinese society in the 21st century. Additionally, since the 1980s, the economic target model for China has been a market economy, which shows that China has been pursuing modernisation as a goal for society. Therefore, 21st century Chinese society is very complicated, the traditional elements and the efforts to modernise have become entangled, resulting in the current Chinese judiciary having a dual nature: a traditional and a modern nature. Although the efforts of the Chinese courts to pursue modernisation is visible over past 30 years, the traditional elements seem to leach into the judiciary, and has held back the process of judicial modernisation.

A. The Modernity of the Current Chinese Judiciary

To pass through 30 years of reform and development, in contrast with before the reform and opening of society, the Chinese judiciary has begun to take the shape of a modern judiciary, particularly in its form. The modernity of the current Chinese judiciary can be seen as follows:

1. The judicial functions have been separated fundamentally and have relative independence from other state organs

The Constitution and the Law on the Organisation of People's Courts were adopted in 1982. This finally confirmed the position, basic system and relative independence of the people's courts as a trial organ, the judicial authority as separated elementally from administrative authority and other state organs, and its relative independence.[360] After a 30 year reformative process, the authority of the judiciary has been promoted gradually in Chinese society. The common view, which is that the most basic legal reform in current China is to establish and perfect a modern judiciary based on the market economy with a modern rule of law model, formed in Chinese society at the end of the 20th

[360] Article 123: the people's courts of the PRC are the judicial organs of the state. Article 126: the people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual. *Constitution of the PRC* (1982).

and beginning of 21st century.[361] Prior to this there was no division between administration and justice, and no independence in the Chinese traditional judiciary.

a. Judicial organs are separated from other state organs

At present, the judicial organs have separated from the administration and the legislative, so that it is an individual organisation, and have formed a huge system from top to the bottom. Dealing with disputes is the main responsibility of the judicial organs and so other organs, including the administrative, have started to withdraw from the field of dispute resolution.

The judicial organs are named the people's courts (Ren Ming Fa Yuan). According to the current Constitution and the Law on the Organisation of People's Courts, the people's courts are the judicial organs of the state.[362] Organisationally, the China's court system consists of the Supreme People's Court and the people's courts at various local levels, military courts and other special people's courts.[363]

i. People's courts at various local levels

The people's courts at various local levels are divided into: basic people's courts， intermediate people's courts and higher people's courts.[364]

i.i. Basic People's Courts.

[361] Lu Yiping, Judicial Reform faces the New Century, *China Shenzhen Governmental White Paper* (2001)181, Lu Yiping , The Judicial Guaranty of Ruling under Law, *Legal System of Shenzhen Special Economic Zone* (2002)vol 1, 22.
[362] *Constitution of the People's Republic of China* (1982), Article 123. *The Law on the Organization of People's Courts of the PRC* (1983), Article 1.
[363] *Constitution of the People's Republic of China* (1982), Article 124. *The Law on the Organization of People's Courts of the PRC* (1983), Article 2.
[364] *The Law on the Organization of People's Courts of the PRC* (1979), Article 2.

The basic-level courts consist of presidents, deputy presidents and judges, as well as established tribunals.[365] The courts are set up in counties/autonomous counties, cities without administrative districts, or in the administrative districts of cities.[366] Their responsibilities are: except for cases otherwise provided for by laws or decrees, a basic people's court adjudicates criminal and civil cases of first instance. When a basic people's court considers that a criminal or civil case it is handling is of major importance and requires trial by the people's court at a higher level， it may request that the case be transferred to that court for trial.[367]

Besides trying cases, a basic people's court also undertakes the following tasks: settling civil disputes and handling minor criminal cases that do not need to be determined by trials; and to direct the work of people's mediation committees.[368]

i.ii. Intermediate People's Courts.

The intermediate people's courts are including the courts established in prefectures of a province or autonomous region; the courts established in municipalities directly under the Central Government; the courts of municipalities directly under the jurisdiction of a province or autonomous region; and the courts of autonomous prefectures.[369] An intermediate people's court is composed of a president, vice-presidents， chief judges and associate chief judges of divisions, and judges.[370] The courts handle the cases as following: cases of first instance assigned by laws and decrees to their jurisdiction; cases of first instance transferred from the basic people's courts; cases of appeals and of protests lodged against judgments and orders of the basic people's courts; and cases of protests lodged by the people's procuratorates in accordance with the procedures of judicial supervision.

[365] According to *the Law on the Organization of People's Courts of the PRC* (1983), a basic people's court may set up a number of people's tribunals according to the conditions of the locality, population and cases. A people's tribunal is a component part of the basic people's court, and its judgments and orders are judgments and orders of the basic people's courts.
[366] *The Law on the Organization of People's Courts of the PRC* (1983), Article 18.
[367] *The Law on the Organization of People's Courts of the PRC* (1983), Article 21
[368] *The Law on the Organization of People's Courts of the PRC* (1983), Article 22.
[369] *The Law on the Organization of People's Courts of the PRC* (1983), Article 23.
[370] *The Law on the Organization of People's Courts of the PRC* (1983), Article 24.

When an intermediate people's court considers that a criminal or civil case it is handling is of major importance and requires trial by the people's court at a higher level， it may request that the case be transferred to that court for trial.[371]

According to the Law on Civil Procedures, civil cases heard by intermediate courts are major foreign-related cases; cases of major implications within their jurisdictions and cases that intermediate courts are ordered to hear by the Supreme Court. In addition, according to the Law on Administrative Procedures, intermediate courts are authorised to hear the following cases: verification of patent rights; customs handling; suits against administrative actions taken by State Council departments or governments of the provinces (autonomous regions, municipalities) and other important and complicated cases.[372]

i.iii. High People's Court.

Higher people's courts are including higher people's courts of provinces; higher people's courts of autonomous regions; and higher people's courts of municipalities directly under the Central Government.[373] A higher people's court is composed of a president, vice-presidents, chief judges and associate chief judges of divisions， and judges.[374] A higher people's court handles the following cases: cases of first instance assigned by laws and decrees to their jurisdiction; cases of first instance transferred from people's courts at lower levels; cases of appeals and of protests lodged against judgments and orders of people's courts at lower levels; and cases of protests lodged by people's procuratorates in accordance with the procedures of judicial supervision.[375]

[371] Ibid, Article 25
[372]. *Criminal Procedural Law of the PRC* (1996), Article 20. *Civil Procedural Law of the PRC* (1991), Article 19. *Administrative Procedural Law of the PRC* (1989), Article 14.
[373] *The Law on the Organization of People's Courts of the PRC* (1983), Article 26.
[374] Ibid, Article 27.
[375] Ibid, Article 28.

i.iv. Special Courts

Currently, China has military courts and other special people's courts,[376] such as Maritime courts.

Military courts are set up at the PLA.

Maritime courts are special courts that are the same level as the intermediate courts set up to try first-hearing maritime or sea-shipping cases for the purpose of exercising judicial jurisdiction over maritime affairs.[377]

ii. The Supreme People's Court.

The SPC is the highest judicial organ of the state, exercising the highest judicial power while supervising the administration of justice by the people's courts at various local levels and by the special people's courts.[378] The SPC is composed of a president, vice-presidents, chief judges and associate chief judges of divisions, and judges.[379] The Supreme People's Court handles the following cases: cases of first instance assigned by laws and decrees to its jurisdiction and which it considers should itself try; cases of appeals and of protests lodged against judgments and orders of higher people's courts and special people's courts; and cases of protests lodged by the Supreme People's Procuratorate in accordance with the procedures of judicial supervision,[380] as well as approve death penalty cases.[381] The Supreme People's Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceeding.[382]

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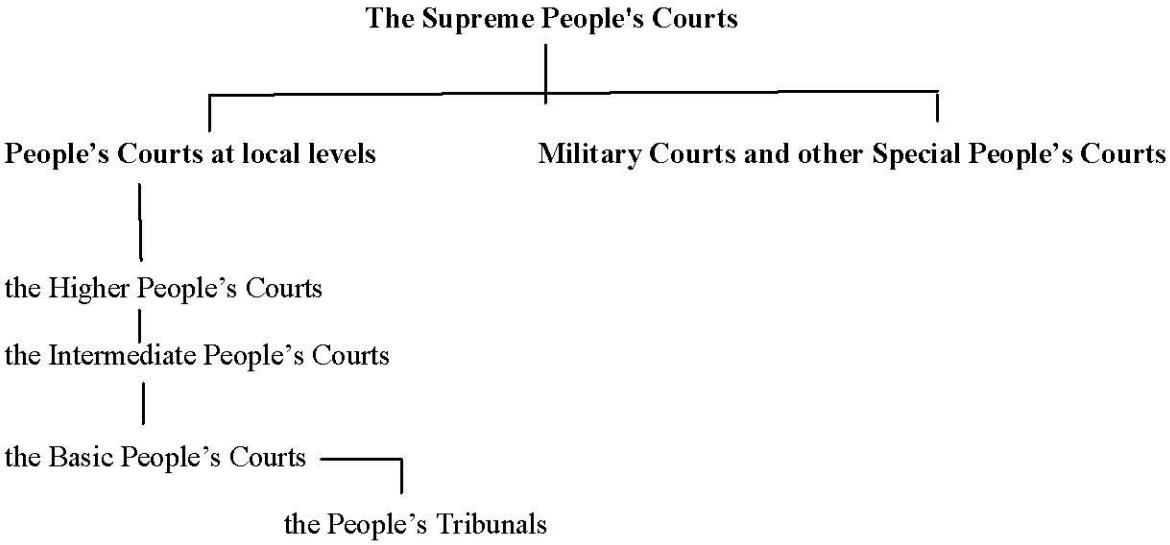
[376] *Constitution of the People's Republic of China* (1982), Article 124. Ibid, Article 2.
[377] *The Supreme People's Court made a Decision on the Scope of Cases to Be Handled by Maritime Courts* (1989).
[378] *Constitution of the People's Republic of China* (1982), Article 127. *The Law on the Organization of People's Courts of the PRC* (1983), Article 30
[379] *The Law on the Organization of People's Courts of the PRC* (1983), Article 31.
[380] *The Law on the Organization of People's Courts of the PRC* (1983), Article 32.
[381] *The Law on the Organization of People's Courts of the PRC* (1983), Article 13.
[382] Ibid, Article 33.

Table 7-1: The China's court system[383]



b. The people's courts possess a relatively independent authority.

In theory, at least, according to the constitution and criminal, civil and administrative procedural laws, the people's courts exercise their judicial power independently, and are not subject to interference by any administrative organ, public organisation and individual.[384]

2. The judicial functions have changed from simple to complex

The judicial functions have changed from principally criminal trials to a number of different types of trials. 30 years ago, there were only criminal and civil tribunals in the courts, but since 1992, new tribunals have been established, such as the commercial tribunal, the estate tribunal, the intellectual property tribunal, the bankruptcy tribunal, the tribunal related to foreign matters trialling commercial cases involving foreign countries, such as Hong Kong, Macao and Taiwan, and the administrative tribunal.

[383] The table is drawn according to *Constitution of the People's Republic of China* (1982), Article 123,124 & 127; *the Law on the Organization of People's Courts of the PRC* (1983), Article 2, 18, 23, 26 & 30.
[384] *Constitution of the PRC* (1982), Article 126. *The Law on the Organization of People's Courts of the PRC* (1983), Article 4. *Criminal Procedural Law of the PRC* (1996), Article 5. *Civil Procedural Law of the PRC* (1991), Article 6. *Administrative Procedural Law of the PRC* (1989), Article 3.

The judicial functions have changed from simple to quite various, one side expresses that the courts strengthen judicial function in invasion of society, the courts have accepted the cases including kinds and numbers are increasing quickly. The number of cases has increased dramatically since 1978, which has caused a great deal of social change.

Table 7-2: 1958 – 2008, the number of cases accepted by the courts:

Time (Year)	**Number of Cases**
1958	2,285,700 [385]
1968	142,860 [386]
1978	500,000 [387]
1988	2,298,000 [388]
1998	5,714,000 [389]
2008	10711275 [390]

Prior to 1978 there were no economic disputes, such as suing, in courts under the planned economic system. After the reforms and opening up of China, particularly after 1992, economic disputes have increased quickly. According to the SPC statistics, in 1983 the courts accepted 44,000 economic dispute cases; in 1989 there were 694,907; in 1993 there were 894,410 and in 1996 there were 1,500,067.[391]

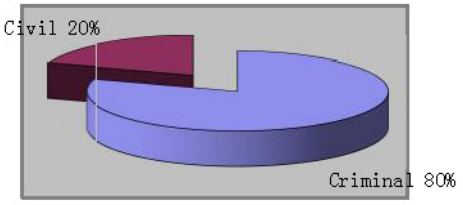
[385] *People's Courts' Newspaper* (Brijing, China), 28 Sep.1999, 1.
[386] Ibid.
[387] *People's Courts' Newspaper* (Beijing, China),28 Sep. 1999,1.
[388] Ibid. Working Report of the SPC 1989, *Bulletin Collection of the SPC of the PRC (1985-1994)* (1995)861-864.
[389] *People's Courts' Newspaper* (Beijing, China),28 Sep.1999, 1.
[390] http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1423.htm
[391] Working Report of the SPC 1987-1996, *Bulletin Collection of the SPC of the PRC (1985-1994)* (1995)807, 879,977. *Bulletin of the SPC of the PRC* (1997), 56.

Before 1978, the social and property relations were very simple and the number of civil disputes was also not too high, for example in 1958 the courts accepted 440,000 civil cases.[392] These cases increased from 632,000 in 1980 to more than 3,517,000 in 1999.[393] In 2009, the courts accepted the civil cases were 5,800,144 [394] that were more than 13 times 50 years ago.

The majority of cases heard before 1978 tended to be of a simple nature and were mostly criminal and civil cases (roughly 80 per cent of cases criminal). In 1998, however, the courts began to accept a number of different cases, such as commercial, estate, bankruptcy, maritime, intellectual property, stocks and administrative cases.

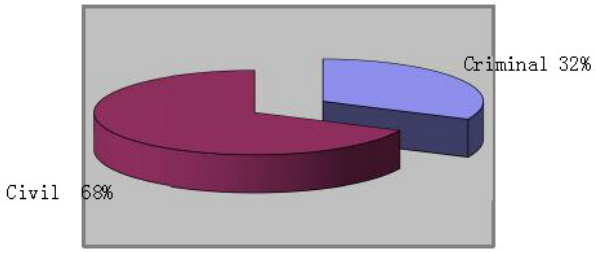
Tables 7-3: 1958-1998: changes in types of cases accepted by courts[395]

7-3-1: 1958

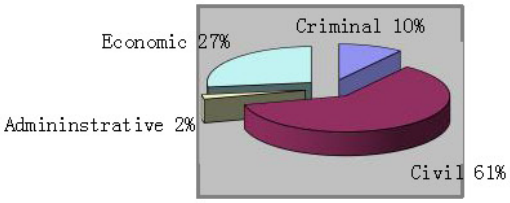


7-3-2: 1978

[392] *People's Courts' Newspaper* (Beijing, China),28 Sep.1999, 1.
[393] *Bulletin of the SPC of the PRC* (2000) 41.
[394] http://www.court.gov.cn/qwfb/sfsj/201004/t20100408_3852.htm
[395] *People's Courts Newspaper* (Beijing, China), 28 Sep.1999, 1



7-3-3: 1998



The other aspect of judicial functions that has changed is expressed in the function of judicial restriction; a system of judicature supervising the administration according to the law was elementarily established. In 1989, the Administrative Litigation Law was adopted. It was the first law in Chinese history that protected citizen rights and brought 'public officials to the court' through a formal legal procedure. This law authorised the people's courts to review specific administrative actions. Since the establishment of that law, cases of administrative litigation have increased year after year.

Table 7-4: number of first instance administrative cases from 1989-2008 and their percentage increase[396]

[396] Working Report of the SPC 1990-1999, *Bulletin Collection of the SPC of the PRC (1985-1994)* (1995) 880, 915, 939, 952, 978. *Bulletin of the SPC of the PRC* (1995,1996,1997,1998,1999), http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1412.htm

Year	Number of Cases	Increasing rate (%)
1989	9,934	15.88
1990	13,006	30.92
1991	25,667	97.40
1992	27,125	5.68
1993	27,911	2.90
1994	34,567	23.84
1995	51,370	48.61
1996	79,527	54.81
1997	90,557	13.87
1998	98,000	8.00
2008	108398	9.22

Thereafter, the State Compensation Law (1994), the Law of Administrative Review (1999), the Law for Administrative Punishment (1996) and other related laws were adopted and implemented that promoted the judicature's supervision of the administration. Between the years of 1995 and 1997, when the State Compensation Law was coming into force, the courts tried 870 state compensation cases, 364 of which received state compensation.[397] In the year of 2008, the courts tried 1634 state compensation cases, 543 of which received state compensation. [398]

In a country such as China that has a long history of administrative powers playing the leading role in society and where 'fighting the tiger, suing the officer and farewelling the forefathers' have been regarded as the three most feared actions, it is a significant milestone for people to be able to sue administrative organs and receive state compensation.

[397] Working Report of the SPC 1998, *Bulletin of the SPC of the PRC* (1998), vol 2, 43.
[398] http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1406.htm

3. Trial in accordance with the law as the basic judicial principle

The past 30 years have been a significant turning point in Chinese development, from a traditional to a modern society. During this time, the most significant sign of progress in the legal and judicial modernisation came in 1999, with the establishment of the law as the governing and guiding principle for society.[399] Accordingly, judicial-related laws also established that the courts should take the law as a criterion for all cases as a basic judicial principle.[400] Therefore, it was a basic requirement of the courts to try cases in accordance with the laws, including the judicial interpretations made by the SPC. Although there was argument about whether the policy was higher than the law or the law was higher than the policy, finally the leadership of state organs, including the judicial organ, was unified under the thought that the policy should appear in a legal form and should become a trial standard at least with regards to judicial work.

Even though the Chinese laws have not stipulated about precedent and justice making law system; but in fact, the machine-processed, which has developed legal system through the judicial work, has existed at the certain degree. This has shown that the SPC has made many judicial interpretations, which are detailed rules and regulations of the legislations de facto. It is already becoming a convention that when a new law is adopted, it will be applied direct by the courts and the SPC should make a detailed rule of the law. The name of the detailed rule generally represents how to apply the law in judicial practice. For example, the General Principle of the Civil Law of the PRC has only 156 articles, but the judicial interpretation of the law, issued by the SPC, has 230 articles. This also is one of reasons that some scholars and officers criticise the SPC attempting to extend its power which has made inroads on legislative power via a judicial interpretative authority. The other side, this has also showed that the SPC has published some typical of cases on its bulletin to guide the trial work nationwide. For example, it is not stipulated that a person can receive mental

[399] *Amendment to the Constitution of the PRC* (1999), Article 13.
[400] *Criminal Procedural Law of the PRC* (1996) Article 6. *Civil Procedural Law of the PRC* (1991) Article 7. *Administrative Procedural Law of the PRC* (1989), Article 4.

compensation via a lawsuit when a tort harmed the person's health; therefore, the courts generally use no legal provisions as a reason to reject appeals for mental compensation. But in 1997, the SPC published a case, Jia Guoyu v Beijing International Gas Co. and Longkou Kitchen Facilities Factory, in its bulletin. The court of the Beijing Haidian District sentenced that the defendants, the Beijing International Gas Co. and Longkou Kitchen Facilities Factory, should pay mental compensation to the amount of RMB100, 000 to the victim of this case.[401]

It is commonly known that the precedent system has been denied by the Chinese legal system. However, the cases published on the bulletin of the SPC have been regarded as quasi-precedents by the local courts; the SPC hopes that these cases have the same functions and affection as precedents. The SPC confirmed in its official documents that the cases published on the bulletin had been discussed seriously by the judicial committee of the SPC before they were published, so that their accuracy and authority is ensured. Therefore, they are an authoritative guidance for performing trial work well and promoting trial quality; the SPC asked every judge to obtain and read the bulletin.[402]

4. Procedural standards have been established primarily

A system of judicial procedure was provided by the Criminal Procedure Law, the Civil Procedure Law and the Administrative Procedural Law. Accordingly, the SPC also separately issued detailed rules for the laws. In contrast to the years preceding 1978, where there were no procedural laws and rules, the legal system had now taken on a new look. The main reason for this change is the lawsuit values of implement. This is quite different from western procedural values, where the procedure has its own independent value of the right of parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, must be notified.[403] Chinese lawsuit values of

[401] *Bulletin of the SPC of the PRC* (1997) 68-70.
[402] The Decision about the Nature, Position and Function of the Bulletin of the SPC, *Bulletin Collection of the SPC of the PRC (1985-1994)* (1995)1029-1030.
[403] *Black Law Dictionary* (1979) 1083.

implement are based on the view that procedural law is a necessary means for enforcing the substantive laws. In this way, the relationship between the substantive and the procedural law is the so-called 'relationship of the body and usefulness'. In this regard, the procedural rules have certain values.[404] Naturally, this reason has caused some limitations and a measure of elasticity to enter into Chinese procedural laws.

a. Trial organisations in the judicial procedures. There are definite rules to follow and there are definite procedures that enable people to use the courts to seek justice. According to procedural laws, trials of the people's courts take the forms of sole judge court, collegiate panels and judicial committee.[405]

i. Sole Judge Court

This kind of court is presided over by one judge for trying simple cases that include: first-hearing criminal cases handled upon complaint and other minor criminal cases;[406] simple civil cases and cases involving economic disputes handled by grassroots courts and their detached tribunals; cases tried using special procedures, excluding cases involving voters' qualification or other complicated cases, which should be tried by a collegiate panel.[407]

ii. Collegiate Panels

As a basic trial form of the people's court, collegiate panels consist of at least three judges or a combination of judges and people's assessors. The collegiate panels handle cases including the first-hearing criminal and civil cases; first-hearing administrative cases, second-hearing, re-examined

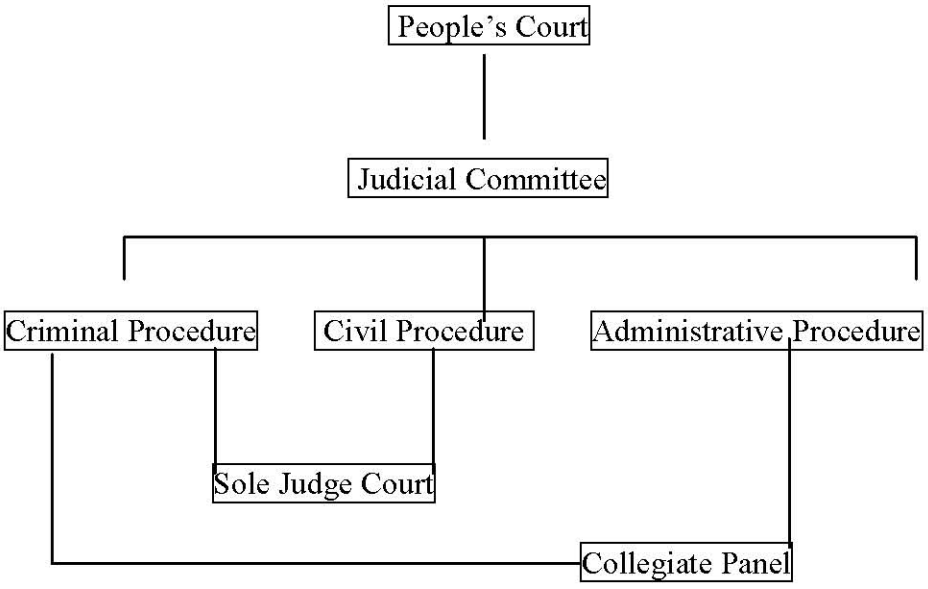
[404] Wang Guosu, *The Textbook of Criminal Procedural Law* (2001) 19. Chai Fabang, *The Textbook of Civil Procedural Law* (2001) 8.
[405] *The Law on the Organization of People's Courts of the PRC* (2006), Article 9.
[406] *Criminal Procedural Law of the PRC* (1996), Article 147, 174.
[407] *Civil Procedural Law of the PRC* (1991), Article 145, 161. 104.

cases and death penalty verification cases.[408] When assessing a case, the collegiate panel should follow the principle of the minority submitting to the opinions of the majority when disagreement arises.[409]

iii. Judicial Committee

In China, the courts at all levels establish a judicial committee according to the law, the members of which are nominated by the president for appointment by the people's congress at the same level. The judicial committee is presided over by the president of the court and its task is to sum up judicial experience and to discuss important or difficult cases and other issues relating to the judicial work.[410]

Table 7-5: Trial organisation in the judicial procedure[411]



[408] *Criminal Procedural Law of the PRC* (1996) Article 147, 187, 202, 206. *Civil Procedural Law of the PRC* (1991) Article 40, 41. *Administrative Procedural Law of the PRC* (1989), Article 46.
[409] *Civil Procedural Law of the PRC* (1991), Article 43. *Criminal Procedural Law of the PRC* (1996) Article 112.
[410] *The Law on the Organization of People's Courts of the PRC* (2006), Article 10.
[411] *The Law on the Organization of People's Courts of the PRC* (2006), Article 9,10.

b. The basic principles and systems of judicial procedures. According to the Constitution and the Law on the Organization of People's Courts, the Chinese people's courts adopted basic principles and systems of judicial procedures as following:

i. Open trials

The constitution and the Law on the Organization of People's Courts provided that all cases in the people's courts shall be heard in public, except for those involving state secrets, private affairs of individuals and the commission of crimes by minors.[412] Even cases that are not tried openly should be publicised when the verdict is passed.[413]
Additionally, in accordance with Civil Procedural Law, cases involving divorce and trade secrets may, upon request by the litigants, not be open to the public.[414]

ii. Defence

The Law on the Organisation of the Courts provide that the accused has the right to defence. Besides defending himself, the accused has the right to delegate a lawyer to defend him. He may also be defended by a citizen recommended by a people's organization or his place of employment, by a citizen approved by the people's court, or by a near relative or guardian. The people's court may also, when it deems it necessary, appoint a counsel to defend him.[415]

iii. The second instance is the last instance.

[412] *The Constitution of the PRC* (1982), Article 125. *The Law on the Organization of People's Courts of the PRC* (2006), article 7.
[413] *Criminal Procedural Law of the PRC* (1996), Article 163. *Civil Procedural Law of the PRC* (1991), Article 134.
[414] *Civil Procedural Law of the PRC* (1991), Article 120.
[415] *The Law on the Organization of People's Courts of the PRC* (2006), Article 8.

The courts have to try cases on two levels, with the second instance being the final judgment according to the law.[416] This means from a judgment or orders of first instance of a local people's court, the party may bring an appeal to the people's court at the next higher level, and the people's procuratorate may present a protest to the people's court at the next higher level. The judgments and orders of second instance of the next higher people's courts and the SPC and judgments and orders of first instance of the SPC are all judgments and orders of last instance, that is, legally effective judgments and orders.[417]

iv. The collegial system.

The people's courts adopt the collegial system when trying cases.[418] Therefore cases of first instance in the people's courts shall be tried by a collegial panel of judges or of judges and people's assessors, simple civil cases, minor criminal cases and cases otherwise provided for by law may be tried by a single judge. Appealed or contested cases in the people's courts are handled by a collegial panel of judges.[419]

v. Challenge system

The challenge system is if a party to a case considers that a member of the judicial personnel has an interest in the case or, for any other reason, which may undermine the impartiality of the judgment, the party has the right to ask that member to withdraw. The president of the court shall decide whether the member should withdraw. If a member of the judicial personnel considers that be

[416] *The Law on the Organization of People's Courts of the PRC* (2006), Article 11. *Criminal Procedural Law of the PRC* (1996), Article 10. *Civil Procedural Law of the PRC* (1991), Article 10. *Administrative Procedural Law of the PRC* (1989), Article 6.
[417] *The Law on the Organization of People's Courts of the PRC* (2006), Article 11.
[418] *The Law on the Organization of People's Courts of the PRC* (2006), Article 9. *Criminal Procedural Law of the PRC* (1996), Article 147. *Civil Procedural Law of the PRC* (1991), Article 40, 41. *Administrative Procedural Law of the PRC* (1989), Article 46.
[419] *The Law on the Organization of People's Courts of the PRC* (2006), Article 9.

should withdraw because he has an interest in the case or for any other reason, he should report the matter to the president of the court for decision.[420]

vi. The death penalty cases' approval

This system refers to the procedures and rules that have to be observed when verifying death penalty cases. Cases involving sentences of death, except for cases with sentences imposed by the SPC, shall be submitted to the SPC for approval.[421]

5. Certain professional division has formed

Prior to 1983, the qualifications for judges were merely a required age limit and political standard, rather than the requirements of legal knowledge and educational background needed now. The Law on the Organisation of the People's Courts was amended in 1983, and added an article that the judges of the people's courts should have specific professional legal knowledge.[422] In 1995, the Judge's Law was made by the Standing Committee of the NPC, which resulted in the slow formation of the judge's system and saw it become a major component of judicial modernity. Since that time, Chinese judges have been selected according to certain qualification and standards. This shows that judicial work itself has its own officially recognised features, which differ from the legislative and administrative works, despite the fact that the understanding of these features is various and judicial practice is also endlessly various. In 2001, the judge's law was amended and a new article added that established a national judicial examination for people wishing to enter the legal profession as judges, prosecutors or lawyers.[423]

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[420] *The Law on the Organization of People's Courts of the PRC* (2006), Article 15.
[421] *The Law on the Organization of People's Courts of the PRC* (2006), Article 12.
[422] *Amendment to the Law on the Organization of People's Courts of the PRC* (1983), Article 9.
[423] *Amendment to Judge's Law of PRC* (2001) Article 14.

i. The qualifications of judges

The judges are the judicial personnel who exercise the judicial authority of the State according to law. The judges include presidents and vice presidents of courts at various levels, members of judicial committees, presidents and vice presidents of tribunals, judges and assistant judges.[424] The responsibility of the judge is to participate in collegiate panels or to be independent judges at trials.[425]

Judges are elected with the following qualifications: a citizen of the People's Republic of China; at least 23 years of age; supports the Constitution of the PRC; in good political, professional and moral standing; in good health; a graduate of law from an institution of higher learning, or a non-law graduate from an institution of higher learning with an in-depth knowledge of law, with two years of legal working experience, and with three years of legal working experience as a judge in a high people's court and the SPC; those holding a Master's or Ph.D. in law or holders of a bachelor's degree in a non-law field, with a full year of working experience, and with two years of working experience as a judge in a high people's court and the SPC.[426]

Those that have been previously penalised for crimes or have been dismissed from their public offices shall not be elected judges.[427] Additionally, the presidents and vice presidents of the courts, presiding judges and deputy presiding judges of tribunals, judges and assistant judges must be citizens of at least 23 years of age, with voting rights and rights to be elected as well as legal knowledge. [428]

ii. The judges' appointment and removal

[424] *The Judge's Law of the PRC* (2001), Article 2.
[425] *The Judge's Law of the PRC* (2001), Article 5
[426] *The Judge's Law of the PRC* (2001), Article 9.
[427] Ibid, Article 10.
[428] *The Law on the Organization of People's Courts of the PRC* (2006), Article 33.

Presidents of local people's courts at various levels are elected by the local people's congresses at corresponding levels, and their vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed and removed by the standing committees of the local people's congresses at corresponding levels.[429] Assistant judges of a court are appointed and removed by the president of the court.[430]

The President of the Supreme People's Court is elected by the National People's Congress, and its vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed or removed by the Standing Committee of the National People's Congress.[431]

iii. Safeguards for Judges

The Judge's Law provides judges with some safeguards, including professional safeguards, salary safeguards, and corporal safeguard. Judges enjoy the rights of retirement, resignation, training, petition and complaint. After retirement, they are entitled to pension insurance and other benefits as prescribed by the state. [432]

B. The Traditional Features of the Current Chinese Judiciary

In contemporary China, it is a fact that the judicial reforms have made a certain grade, which is there for all to see. However, it can also not be denied that a modern judiciary is in tune with the principles of a market economy, democracy and the rule of law has not yet been truly formed. The current Chinese judiciary is still interspersed with traditional features.

[429] *The Law on the Organization of People's Courts of the PRC* (2006), Article 34.
[430] Ibid, Article 36.
[431] Ibid, Article 34.
[432] *The Judge's Law of the PRC* (2001), Article 24, 34, 35, 36, 37, 40.

1. Judicial activities have been controlled in many ways including both formal institutional and informal institutional arrangements; the courts cannot manage personnel, financial and judicial matters autonomously

a. Judicial affairs have been controlled by the CCP.

As discussed in chapter 6, the CCP is the sole party in power in China; its power involves all aspects of national affairs, including judicial issues. Since 1949, the CCP has emphasised that judicial work must be led absolutely by the CCP. Consequently, the CCP established the political and legal committees, from the central to the local levels, to be in charge of managing judicial affairs. The members of the committees generally include the deputy secretary of the local committee of the CCP, the chief of local police, the president of the local court, the president of the local procuratorate, the chief of the local judicial administration and the chief of the local civil administration. Moreover, the CCP also establishes the team from the CCP that controls judicial affairs in every court. The members of the team include the president, deputy presidents, the chief of the CCP discipline's examination and the chief of political department. Therefore, the working reports of the courts from the central to local level begin with the sentence, 'the courts have been led by the CCP'.[433]

The CCP is not involved in judicial affairs just through the teams in the courts but also through the local committees of the CCP and the political and legal committees of the CCP who exercise a great deal of influence on the judicial affairs with a number of methods, from making judicial policies to interfering with individual cases, as well as taking control of judges' appointment and removal. Apart from leading judicial affairs macroscopically, the other main function of the political and legal committees of the CCP is to coordinate the dealing of individual cases directly. Usually the

[433] 'The Supreme People's Court has been led by the Central Committee of the CCP…'. 'All levels of the local people's courts and the special people's courts have been led by all levels of the local committees of the CCP…'. Xiao Yang, the Working Report of the Supreme People's Court 2001, *Bulletin Collection of the SPC of the PRC* (2001)40.

secretary of the committee calls all members together to discuss serious, complex and knotty cases and make decisions on these cases. Additionally, the judicial organ must report its work to the committee of the CCP and the political and legal committees of the CCP at the same level. Because the chief of police is usually also the secretary of the political and legal committee of the CCP or a member of the committee of the CCP, a strange phenomenon where the presidents of the courts must report judicial work to the chief of the police exists in China.[434]

The other way that the CCP interferes in judicial affairs is that when a court calls a particular party to the stand who is protected by the CCP or has a certain position within the CCP, the court must gain permission from the committee of the CCP.[435]

b. interference from the people's congress

In China, the basic political system is the system of the people's congress. This is different to the Australian and other western countries' power structures, which are based on the 'separation of three powers'. In China, the National People's Congress and their Standing Committee is the top of all national organisations. According to current laws, the relationship between the people's congress from the central to local levels, and the judicial organs from the central to local levels are not equal relationships of mutual restriction. The National People's Congress has power over the judicial organ; the judicial organ must report its work to the National People's Congress. On one side, the people's congresses make the standards for judicial works, such as judges' appointment and recalls and make laws for judicial trial works[436]. On the other side, the people's congresses also hear and check the courts' working reports, and inspect, require and supervise the courts' work.[437] As legislative organs, some authorities in the people's congresses may practice around the world, by

[434] Chinese News reported that Zhou Yongkang, the member of the Political Bureau of the CCP and the minister of the Public Security Department, inspected the Supreme People's Court, Xiao Yang, the President and the Chief Judge of the court, reported work to him. *People's Courts Newspaper* (Beijing, China), 6 Feb.2003, 1
[435] *Chinese Youth Newspaper*, 1 Dec.1997, 1.
[436] *Constitution of the People's Republic of China* (1982), Articles 62, 63, 67 and 101.
[437] *Constitution of the People's Republic of China* (1982), Articles 104, 128.

making laws and rules, appointing judges, however, there are probably very few countries' legislative agencies that inspect and supervise the courts' work as they do in China.

In practice, the people's congresses' supervision of judicial work almost always becomes the authority to supervise individual cases, and sometimes they even require the court to give a judgement in accordance with their own opinions. For example, in 2001, the Shenzhen Economic Zone People's Congress called parties of cases that had been tried by the Shenzhen Intermediate People's Court to appeal to the congress. The congress then passed the appeals, of which there was roughly 300, to the court and asked the court re-examine the cases and answer the parties directly.[438]

When a case was appealed to the congress, the congress could choose whether to get involved or not. The congress might request the court to retry the case or in some cases they even arranged for the parties of the case and the judges who tried the case to discuss it together. Given the fact that some parties of cases are representatives of the congress, they are able to ask other representatives to interfere directly with their case and even ask questions about the cases. Therefore, it is extremely difficult for the courts to deal with such cases.

c. governmental influence on judicial work.

In the Chinese political structure, the government has authority over other state organs. Because the chief of the government at the local level usually doubles as a director of the government and a deputy secretary of the committee of the party, and as the court's personnel and financial issues are controlled by the government, the central and local level governments have the ability to interfere with judicial work. Additionally, in the party's order, the president of the court and the court's work

[438] While researching the Chinese Court's justice independence, I investigated into the grassroots' courts and intermediate courts in the Guangdong province in 2001and wrote up an investigation report to publish as an internal reference. All references to examples or investigating materials are from that report except where noted.

should submit to the director of the government, who is also the deputy of the party's committee. For example, firstly, the local governments could ask the local courts to reject putting some cases on file, particularly administrative litigation cases. Secondly, in the processes of trial and enforcement, if the case involves local benefits, the government will always interfere with the case by giving suggestions to the court, by calling the judges who are in charge of the case to report or by getting the parties of the case, the relative governmental departments and the court together to discuss and come to a solution.

For these reasons, the courts become the subordinate of the governments, especially at the local level. A president of a grassroots court stated that under the current institutional arrangement, the court should harmonise and keep the good relationships with the party's committee and the government. Because between the organs of our state organisation, including judicial organ, have not separate clearly, the relationships of every organs are very close. We are all working for the CCP, for the social stability. Therefore, we should support each other, and also should abide by the instructions from the leaders of the party's committee and the government.

d. interference from internal courts.

Under the current institutional arrangement, the whole state organ, including the judicial organ, have been treated with the same organisational structure and managing style. Even today, the judicial operations still scrupulously abide by the rigid model formed in the 1960s.

Firstly, the judicial organs have been set up in accordance with the administrative territories; the local judicial organs correspond with the local administrative organs, and in the local government's popedom.

Secondly, since 1949, the national cadre became a uniform appellation for all state employees, and also used the administrative distinction as a centre to establish the cadre's managing system, which was suitable for all national employees including judges. The judges, from the chief judge to assistant judges, all have a certain administrative level like military ranks. A judge's treatment (from political to benefits) is fixed by the judge's rank. In the same court, a lower judge has to abide by a higher judge in accordance with the administrative distinction.

Thirdly, the director's responsibilities, asking for instructions and the court report system have been applied widely in judicial works. In Chinse courts, the judges are regarded as the judicial organ's employees, rather than as a judge's status appearing on the judicial stage. According to the current laws and judicial theory, Chinese judicial authorities have been operated by the courts, [439] in other words, the individual judge does not enjoy trial authority.

For these reasons, in Chinese courts, those judges with higher administrative levels, such as the president or deputy president, presiding judge or deputy presiding judge of the court, have the authority to interfere in trials. The judges also are used to ask for instructions from higher level judges. The typical working style may begin with the presiding judges looking through the cases and judgments. The presidents or deputy presidents of the courts examine and approve the judgments, the judicial committees of the courts make judgment on cases and instructions and salutations for certain cases come from high level judges or courts. Although this is an informal procedure it has have been applied broadly in the Chinese judicial system.

[439] *Constitution of the People's Republic of PRC* (1982), articles 126: 'the people's courts exercise judicial power independently.' *Criminal Procedural Law of PRC* (1996), article 5: 'the people's courts shall exercise judicial power independently in accordance with law'. *Civil Procedural Law of PRC* (1991), article 6: 'the people's courts shall try civil cases independently in accordance with law'. *Administrative Procedural Law of PRC* (1989), article 3: 'the people's courts shall, in accordance with law, exercise judicial power independently with respect to administrative cases'.

In summary, the Chinese judiciary, from framework design and functional confirmation to judicial procedure, is a basic copy of an administrative pattern, rather than a design in accordance with the judicial rules.

2. The judicial functions are limited

According to the current laws, the Chinese judicial organ has no authority to check and balance other state powers. Although the Chinese courts have a certain restricting function to administrative power, in accordance with Administrative Procedural Law, the function's effectiveness is in question.

Since the Administrative Procedural Law came into effect officially in October 1990, the number of administrative cases has not increased greatly. In contrast with criminal and other cases, the administrative cases have been less pitying. There are roughly 3000 grassroots courts and 600 intermediate courts in China, and in 2000, the courts tried roughly 86,000 first instance administrative cases. In the same time, nearly 500,000 first instance criminal cases and 4,730,000 first instance civil cases were tried by the courts.[440]

According to Administrative Procedural Law, every Chinese court should establish an administrative tribunal, which contains no less than 3 judges, to try administrative cases.[441] However, many grassroots courts have not established administrative tribunals or do not have enough judges to organise a tribunal. The main reason is that the local courts are afraid to offend the local party's committees and governments by trying administrative cases. Meanwhile, many administrative organs and officers have the attitude of the privileged and refuse to attend court or refuse to adhere to the court's judgment. Even in cases where the police are the appellees, the police

[440] The Working Report of the Supreme People's Court 2001, *Bulletin Collection of the SPC of the PRC* (2001)40.
[441] *Administrative Procedural Law of PRC* (1989), Article 3, 6.

officers arrest accusers in the courts to stop enforcing the trial processes. A basic rule is that the leaders of local party's committees or governments can call the courts and the accused administrative organs together to discuss the case and make a decision. Just about these reasons, the courts had initially the authority of restricting administrative powers in accordance with the law to bankrupt in.

On the other hand, the scope of accepting cases is limited by the Administrative Procedural Law. According to article 11 of the law, the people's court shall accept lawsuits brought by citizens, corporations or other organisations against any of the following specific administrative acts:[442]

1)An administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation, which one refuses to accept.

2) A compulsory administrative measure, such as restricting freedom of the person or the closing up, seizing of property, which one refuses to accept.

3) Infringement upon one's managerial decision-making powers, which is considered to have been perpetrated by an administrative organ.

4) Refusal by an administrative organ to issue a permit or licence, which one considers oneself legally qualified to apply for, or its failure to respond to the application.

5) Refusal by an administrative organ to perform its statutory duty of protecting one's rights of the person and of the property, as one has applied for, or its failure to respond to the application.

[442] Ibid, Article 11.

6) Cases where an administrative organ is considered to have failed to issue a pension according to law.

7) Cases where an administrative organ is considered to have illegally demanded the performance of duties.

8) Cases where an administrative organ is considered to have infringed upon other rights of the person and of the property.

From the above provisions, we can see that administrative litigation in China is only limited to the government acting illegally against the rights of the people and of property, and the specific administrative activities under the provision of law; it does not include political or other rights, and also does not include abstract administrative acts. These limitations mean that the Chinese courts have no real and effective authority to restrict administrative power and protect the people's rights.

The traditional idea of the courts being regarded as an instrument for maintaining social order and stability still stands as a mainstream thought in the current official ideology. Consequently, the function of traditional criminal repression has continued to be regarded as a main function of judicial works[443]. We can also see that the courts' social function has distended to a certain level but, generally speaking, the courts have not become a final and effective authority for settling social dissensions in current Chinese society.

3. The trial in accordance with the law has been treated emptily

[443] 'The first mission of the people's court was to maintain the state security and the social stability.' See The Working Report of the Supreme People's Court 2001, *Bulletin Collection of the SPC of the PRC* (2001)40.

The courts and judges made judgements according to policies, current social requirements or social circumstances rather than the law. Due to the fact that the courts exercise judicial work in accordance with state work, to be emphasised without measure[444], the neutralisation and independence of judicial work has been ignored in judicial practices. Consequently, the short-term policies of the central or the local governments have been always applied instead of the law in practice. For example, during the term of 'Ironhanded Striking'[445], the criminal cases were more severely punished than at any other time. In fact, in my opinion, when Chinese courts and judges are trying cases, they pay too much attention to the certain situations of the cases that deviating the role, action's model and judgement which have been given by the legislation.[446]

The Chinese judges have had a strong power of discretion de facto during the current transition, but China lacks developed legal explanation skills supported by a procedural justice system and reasonable demonstration. Therefore, the judges' discretion tends to lack justice and becomes opinionated and arbitrary. For example, even in 2000, the Liaoning province's courts still applied for the document adopted by the Liaoning Revolutionary Committee in 1978 that forbade and punished other provinces' businessmen doing any business related to beer in Liaoning province in order to protect the local beer industry.[447]

Because even the higher courts and judges must follow the instructions from the leaders of the party's committees, governments and the people's congresses, the judicial work cannot provide an expectation of justice or security for the people. Consequently, people view the law as like a paste which that can be kneaded and changed discretionarily by those with power or money and using this power or money can also solve illegal problems.

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[444] 'The Supreme People's Court has surrounded closely to the overall situation of the party and the state works…'. Ibid.
[445] '*Yan Da*' in Chinese, a term of criminal trial is a phrase of 'Ironhanded striking the serious criminals movement' which started in 1983.
[446] In my investigations, I interviewed a president of a grassroots court in Shenzhen city who said that 'the style of thinking in many judges who graduated from universities is just to consider legal provisions, not pay attention to real social life, and also not note the current status of Chinese courts. Therefore they are not suitable to be a Chinese judge.'
[447] *Qi Lu Evening Newspaper* (Shandong, China), 05May2000, 4.

4. The courts and judges neglect the judicial justice procedures; the procedural system has not really been established de facto and de jure

Firstly, an illegal phenomenon in judicial practice has existed widely. In other words, there are many procedural actions that have not been stipulated by the procedural laws. For example, many activities involved in criminal investigation, particularly the use of secret methods in detection, have not been stipulated by the Criminal Procedural Law.

Secondly, the procedures are flexible. For example, although the Criminal Procedure Law prohibits the use of torture to extort confession, it does not explicitly prohibit the use of a confession made as a result of torture as evidence in criminal proceeding. Thereby, there is a loophole in the law that encourages the police to use torture when extracting evidence.

Although the Criminal Procedure Law provides that a criminal suspect can appoint a lawyer during the investigation stage of the criminal proceeding, the lawyer appointed at this stage does not have the status as a defender. His task is to provide legal aid, such as filing petitions and complaints or applying for obtaining a guarantor pending trial on behalf of the criminal suspect, but not to defend the suspect. He may not conduct his own investigation of the case, read the case file or be present during the interrogation of the crimina1 suspects.

Although the Criminal Procedure Law provides that if an appointed lawyer requests to meet the criminal suspect in custody, the police organ should arrange the meeting, the law does not include any specific provisions on how to ensure that the criminal suspect in custody has access to legal assistance without delay. The law also does not provide for the obligation of the police organs to inform the criminal suspect, without delay, of his right to appoint a lawyer.

The Criminal Procedure Law provides that 'no one shall be regarded as guilty unless decided so by the judgment of the people's court.; article 11 of the Universal Declaration of Human Rights states that 'everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.' The difference between these two provisions is apparent: the expression in the former is 'has the right to be regarded guilty', which logically implies 'shall not be considered innocent'; the expression in latter is 'has the right to be presumed innocent'. Therefore, Chinese procedural law has not actually accepted the principle of innocent until proven guilty.

Thirdly, procedural logos are limited. Because the judicial committees' authority for decisions on cases and the president's and presiding judges' authority for examining and approving judgements are at the centre of the internal structure of the courts, the basic procedural rules, stipulated by the procedural laws, such as the principle of direct trial, argument at the bar, the systems of panel hearing, withdrawal, public trial and the idea of second instance as the last instance, have been regarded as empty promises in practice. Additionally, making judgements before the trial as well as the separation of the trial and decision mean that the trial work and judgements are performed outside the court meaning that the court's hearing is merely a formality.

5. The judges' quality is still lower

In terms of legal knowledge, many Chinese judges lack the revelant legal education and training. Until to 2002, there were around 280,000 judges in China. These judges mainly consisted of three types of people: the first type were graduated students of law school or other universities, including postgraduate students; the second type were those transferred from the governments, or other public enterprises and party agencies to the courts; the third type was the army officers who had switched to the courts.

Despite the fact that since 1985, the Supreme People's Courts have established more formal training programs, the overall levels of the judges remain low. At the moment, around 5.6% judges in the country have reached the level of university education; 0.25% judges have a postgraduate diploma; and roughly 30% of chief judges of the provincial high-level courts lack a legal background from university or college.[448] According to my investigations into a grassroots court in western China in 1999, there were 43 judges in the court and only 4.91% among these had graduated from law school. In fact, whether or not a judge has a law degree may not be very meaningful, because most judges have attended a part-time legal course and want only to get a legal diploma. At present, few verdicts or reports summarising cases are well-written.

Moreover, law graduates are still too young and too few to play a significant role in China's judiciary. Additionally, many non-legal training persons have been transferred to the courts as judges, particularly the chief judges of the courts, which has resulted in the opinion that the position of a judge is not regarded as a profession.

On top of the lack of judges' qualifications, in terms of professional ethics, Chinese judges and civil servants are suffering the problem of corruption. With China's adoption of a market economy in recent years, material interests have become highly valued and pursued by the whole of society including the judiciary. The low salary and social status does not afford judges a high standard of modern material life and so some judges begin to accept client invitations to expensive dinners and entertainment, as they are not able to resist the temptation of modern luxury living. Some local governments in financial difficulty will allocate limited money to the local courts, and this has caused some of the local courts to extort funds from their enterprises or other associated clients; certain local courts even misappropriate or steal property in their detention. Some judges require their clients to accompany them to other places to conduct investigations at their clients' expense.

[448] http://www.jjxj.com.cn/news_tetail.jsp?keyno=1087, 02 Oct.2004

Some judges abuse their power by taking coercive measures and detention, while others take bribes from their clients. According to official statistics, during the period of 1998-2002, there were 6,758 judges punished for corruption.[449]

Table 7-6: The figures of Chinese judges punished for corruption.[450]

Year	Number of judges punished
1985	380
1988	351
1989	690
1990	912
1991	49
1992	295
1993	850
1994	1,094
1995	962
1996	1,051
1998	2,512
1999	1,450
2000	1,292
2001	1,080
2003	794
2008	712

[449] *Beijing Morning Newspaper*, 09 Oct.2002, 1

[450] The source for the figures: the working report of the Supreme People's Court 1986 – 2002, *Bulletin Collection of the SPC of the PRC* (1986-2002),http://www.court.gov.cn/qwfb/gzbg/201003/t20100310_2628.htm, http://www.court.gov.cn/qwfb/gzbg/201001/t20100131_950.htm.

There are several reasons for the problems with quality in the Chinese judges as mentioned above.

On a historical level, when the Chinese courts were resumed in the 1980s, there was a serious shortage of judges. To solve this problem, many local cadres and military people were directly transferred to act as judges, most of which had not received any legal training. Military people were considered good candidates for judgeships because they, like police, had been engaged in enforcing proletarian dictatorship and possessed the appropriate ideological outlook on their work. As a result, the quality of trials was greatly affected. The judge's law was promulgated in 1995 and amended in 2001 and stipulated that all new judges have to pass the national judicial examination. However, the exam did not affect those who were already judges prior to 1997. If someone has been transferred to the court to serve as a high position, such as a president or vice-president of the court, he or she also did not need to sit the examination. This law and subsequent exam can help improve the quality of the newly recruited judges. However, comparatively speaking, the qualifications are still quite low as, for example, the law still allows non-law graduates to become judges.

On a mechanical level, China's selection system for judges, if there is one, cannot ensure that every new judge is qualified. In fact, Chinese people find it rather easy to become a judge. There was, until 2002, no national exam to recruit judges; applicants had only to pass an exam held by local courts. Even so, some people still tried to make it easier by bribing the chief justice of local courts or local authorities to gain an exemption from those exams.[451]

Due to the poor overall quality of Chinese judges, the people are generally not satisfied with the job the judges perform and do not, therefore, believe they can achieve justice through the courts. In the public's view, the judicial organ is a 'public patient'.

[451] Zhou Guoliang & Mao Qinghong, Some View on the Promotion of Chinese Judges' Quality, *Observing and Thinking* (1999) vol 3, 28-29.

CHAPTER 8: PROSPECTS FOR FUTURE REFORM OF CHINESE JUDICIARY

Despite the difficulties and setbacks that China has faced in establishing a modern judicial system since the 1950s, it is now possible to believe that China is on its way to establishing a modern judiciary. During the first half of the last century, China transitioned from a country in chaos to having a state of order. During the second half of the last century, China progressed from order to development. After roughly 30 years of reform, and a radical transition of its economy, society, culture and politics, China has moved into a new era. The planned economy has changed to a market economy; society has changed from traditional to modern; culture has changed from monism to pluralism. All of these have aided the overall transition from autocracy and the rule of man to constitutionalism and the rule of law.

A. Post-1992 China and the Pressures for Judicial Modernisation

As a major political policy, the reform of the Chinese judicial system was formally proposed at the 15th Congress of the CCP at the end of the 20th century. This reform was a need that had been felt by the whole society since the 1990s when the socialistic market-oriented economy was in its beginnings. Accordingly, the social structure and its way of running were experiencing a huge change, which applied the necessary pressure to modernise the judicial system.

1. The development of modern market economy in China needs the modernisation of judicial institution

From the development process angle, the economy and the law are inseparable. On the one hand, the economy is the basis for the formation and the development of the law; on the other hand, the law reacts upon the economy. 'In each historical time, the economic production and the social structure resulting from it are the basis of the political and spiritual development of that time.'[452] Politics, the law and other spiritual products that are developed on the economic basis are called the superstructure; once these factors come into being, they will react upon, and serve the need of, the economy.

[452] The Translation and Edit Bureau of the Contral Comittee of the CCP: Marx & Engels, *Marx and Engels Collection* (1980) vol 1, 232.

Generally speaking, there are three main modes of economic institution: the natural economy, the product economy and the market economy. Along with these are also different types of legal and judicial institutions.

A natural economy is a closed, self-sufficient economy based on agriculture, where the family, the plantation and the village are the units of social production. The people are both producers and the consumers of their own products. The levels of division of labour and the level of specialisation are very low and the links between economic organisations are weak. The people live in a narrow, closed society. As a result, the norms regulating the social relations are mainly the patriarchal system based on blood ties; the laws and judiciary developed on the basis of this system. It is characterised by the arbitrary, hierarchical and cruel methods of punishment that are used to maintain the dependency of the producers to the economically-dominant classes.

The product economy, also called the planned economy, is one in which the production and the distribution of products are directed by a state plan. As a result, the politics and the economy are combined and the economy is a handmaid to politics. Under such economic conditions, private law, which regulates horizontal economic relations among the people, is negated and administrative orders, regulations and instructions, designed for the implementation of the top-to-bottom economic plan and distribution system are highly developed. Under these conditions it was not only impossible to develop a system of the rule of law and a modern judiciary, but even the development of a simple legal system and judiciary was considered a hindrance. As a result, a situation of outright rule of man emerged. Former Soviet Union, eastern European socialist countries and China before its reforms are examples of a product economy.

Under the market economy, the allocation of the capital, labour, and other resources and the distribution of products are regulated largely by the market. The state then plays a role in regulating and directing the market, but it no longer holds the dominant position in the economy. It is generally agreed that the market economy is 'the midwife' of the rule of law and modern judiciary. However, people have different opinions as to why and how the market economy takes on this role. To some extent, these differences reflect the different understandings of the rule of law and modern judiciary and the preference for different modes of the rule of law. For example, Marx Weber believes that the reason the market economy can create a society under the rule of law is that the market activities require predictability and calculability[453]. In my opinion, it is due mainly to the market economy creating a far greater demand for laws and a modern judiciary, in terms of quality and quantity, than

[453] Max Weber, *the Protestant ethic and the spirit of capitalist* (1985).

the natural or product economies.

During the formation and development of a modern, western, capitalistic market-oriented economy, the modern judicial institution is crucial. According to the deceased historian, Mr Huang Renyu's research on the history of the modern market-oriented economy of the UK, the so-called market economy is not just a kind of economic management. The UK was the first country to establish the market-oriented economy. The main reason for this was their legal system, particularly the judicial system which provided a basis and a favourable environment for the growth and development of a market economy.[454]

There are two concerns with that. On the one hand, under the market economy, the distribution of resources is accomplished by individual economic parties, which are in law equal, independent and autonomic. In contrast, under the planned economy it is fulfilled by a unified administrative order. To avoid chaos and inefficiency, there must be unified and authorised regulations to normalise the procedure of distribution. For instance, under the market-oriented economy, the relationships between all the parties rely on the contracts; hence, in order to ensure the justice of the contracts and make sure both parties obey their agreement, there must be a judicial system. The legal standards could then be drawn to protect the freedom of contracting and the safety of the transaction, and to remedy any violations in a timely and proper manner. On the other hand, individual wills are respected; however, this does not mean that the government imposes no restrictions on the people. In fact, governments must have their own policies implemented during the running of the economy, not only for the demands of macro-control and social management, but also to improve the efficiency of distribution and use of social resources. In this situation, although there is a level of government control, the mutual relations between government agencies are loose. As a result, government control is implemented through legal and judicial institutions to avoid chaos. The rule of law and a modern judiciary are two of the biggest differences between western and developing countries.

The market economy is not just an 'economic' model, but is also connected to the whole social structure of a country, in particular the legal system and modern judiciary. The development of a market economy requires not only civil, economic and administrative laws that directly regulate the market, but also laws and a judiciary that safeguard the fundamental rights of the citizens, regulate the conduct of the government, maintain social order, and protect the environment and the natural

[454] Huang Renyu, *Capitalism and 21 Centenary* (1991).

resources. These laws are necessary to create favourable external conditions and a social environment for the operation of the market economy and to ensure stable and sustainable economic development.

One of its key features is emphasis participants place on long term profits and accurate and systematic calculations, rather than regarding business as gambling or pursuing huge and sudden profits. This rational economy requires the most accurate anticipation of risks in future and relevant strategies, to fulfill the goals of the investment. New requirements to the legal and judicial institutions arise from the transition of the economic mode: the law should be rationalising, systematising and generalising, and the consequences of legal procedure should be easy to anticipate. Accordingly, the judicial functions and professional behaviour of judges also need changes. Giving judgments according to traditional values or other arbitrary methods are not acceptable under the market-oriented economy; instead, judges are required to protect justice by exercising abstractive and formally rational law.

As a result, the modern judicial system is different from the traditional in its very core. The internal logical relations and external relations as a whole are more emphasised, which means the justice of legal procedures are the major part of this topic, rather than the directly substantial justice in individual cases. Additionally, judges should have qualifications different from the professions of other government agencies. They should also solve disputes according to clear, systematic and specific regulations, rather than social emotions. It indicates that the formal rationality of the market-oriented economy demands and improves the further formality and rationality of the judicial institution; in return, the judicial institution with a formal rationality can protect the development of a market-oriented economy.

2. The management of Chinese society and the improvement of its structure need the modernisation of judicial institution

Because of the reliance on the rule of law in a socialistic market-oriented economy, the traditional management of the society and its structure experience a huge transformation. The variations in social management and the structure of the Chinese society since the 1990s can be seen in the following features.

Firstly, the ownership system underwent a relatively large adjustment. This occurred initially with an increase in the proportion of the non-state-owned economy and a relative decrease in the

percentage of state-owned enterprises. Undoubtedly, this adjustment is positive in the context of economics, however, it could reduce the amount of resources controlled by the government, which would weaken the government's bargaining power when dealing with social issues.

Secondly, the society became more and more multicultural. This led to the mainstream ideology losing its influence, both in scope and depth. Under this circumstance, the focus of social management and control falls into legal hands.

Thirdly, there are changes in the relationship between social control and restriction. Before the reforms, social controls and restraints relied on three groups: the CCP and governmental system, judicial organs and ideology. Following the reforms, especially after the 1990s, although this kind of control still existed, it changed dramatically. With the development of the market-oriented economy, the scope of control of the CCP and the government decreased, while the level of restrictions is also becoming looser. One of the reasons for this is that under the market-oriented economy, many economic parties are no longer under government control and, more importantly, those units, exercising orders from the CCP and the government, and also representing the authorities, have a functional change. The units are more like economic groups, and their motives and abilities of accepting government orders to control society through managing the members of the units are weakened. On the other hand, the power of ideology is beginning to lose its influence as the values and thoughts of the public change. In this case, legal and judicial systems would have to take responsibility for social control. From the experience of modern countries with free market economies, it evident that as a multitude of interest groups are formed, it becomes very important for the government to adjust and harmonise the interests among them. Although a modern society is not highly centralised, it is well-developed and harmonious, for which the legal and judicial systems can take the credit. This would be supportive to the argument that under the market-oriented economy, the judiciary must be responsible for releasing tension and solving, as well as maintaining social order and development. They would achieve these by establishing rational rules and regulations for rights and obligations.

3. The judicial system in practice does not have the capability to solve disputes in the current Chinese society

The Chinese judiciary should be taking over the responsibilities of social management, however, there are traditional 'left overs', which mean it cannot take the full burden.

The current Chinese judicial institution does not have the strength to solve all kinds of social conflicts and disputes; additionally, the current status of the Chinese judiciary in the government (especially in practice) is far behind the 'should be' position required by a modern society. This indicates that the actual needs of the Chinese society for a judiciary have not been put in place, neither in policy nor in practice.

At the same time, the distribution of Chinese social resources and the running of the economy are experiencing huge changes, which bring the responsibility of protection onto the judicial system. However, the system has not been able to keep up with this demand. Since the 1990s, China's economic system has changed from a 'market-tasted' to a completely 'market-oriented' system. Additionally, the market is gradually taking control of the distribution of resources, particularly in the South-eastern area, which has led to market-control holding a dominant position in society. Successful practice and experience in western countries has shown that the free market economy can only exist and develop in a stable institutional setting. The institutions, as North said, are to reduce uncertainty by establishing a stable structure for human interaction.[455] Facing the escalating development of a market-oriented economy in China, the reaction of the Chinese judicial system is timely however it is still falling behind as a whole. The most apparent indication is the many cases in which Chinese courts would refuse to accept the plea with the excuse that there is no law in regard to that issue. The first reason for this is that, compared to the economy, the judicial system always lags behind. For the legal system, particularly judicial practice, it would take a certain period of time to meet the requirements of the economic activities, which means that adjustments are always falling behind the progress of the economy. Secondly, the formation and development of market-oriented economy are totally new concepts to the Chinese judicial system. If we admit that it would take a relatively long time to fit in the market-oriented economy in the economic field, then we have to accept that it would be an even more difficult task for the judicial field to establish a legal order in line with a free market economy. Even when the Chinese legislature works speedily, the judiciary does not have the capability to keep pace with the e social and economic issues that arise in a dynamic and changing economy, due to a lack of resources.

In regard to the social issues, the Chinese judiciary is the agency to take the responsibility for any flaws or inadequacies in the legislation. On the other hand, in judicial practice, because Chinese judges are limited by their own knowledge and experience, they cannot always be correct in judging which legal activities are good and necessary for the progress of economy; neither can they always perfectly find the major point of an issue. In addition, during the transition of the Chinese

[455] Douglass C. North, *Institutions, Institutional Change and Economic Performance* (1990) 6.

institutions, the judiciary has to balance different requirements between the new and old institutions. Under many circumstances, the Chinese judiciary not only needs to face the reality brought by the transition from the old institutions to the new with a tolerant attitude, but also has to advocate and maintain the new orders under the new scheme with farsighted strategy. Solving the conflicts that occurred during transition is in the practice an extremely difficult task.

We should be aware that, essentially, the Chinese social transformation is an adjustment of all kinds of interests from all levels of the hierarchy, and therefore conflicts of interest are unavoidable. As social life becomes controlled by the law, all conflicts or disputes become potential court cases. When the conflicts or disputes cannot be solved by mediating, the parties involved would usually tend to look for the solution under the judicial institution. Accordingly, in China, all kinds of conflicts or disputes that came from the very early stages of the society and occurred during the transformations were passed to the judiciary directly or indirectly. However, in opposition to the people's will, the Chinese judiciary could not maintain its 'should be' neutral status because of certain social conditions (the special institutional arrangements), and the pressure from aspects of the society.

To some extent, the pursuance of the rights and interests of the public is rational and supported by current Chinese political principles and economic regulations. More specifically most of the social groups can find advantages under the official ideology and use the media to advertise their ideas, which would in turn pressure the judiciary to give them special protection. In this circumstance, we would say that the task of the Chinese judiciary is to address the balance of different interests, rather than being about the application of legal principles to cases. Additionally, maintaining the social order is always the priority of the Chinese government when dealing with the conflicts created from the transformations. In this case, if the result harms social stability, the justice has to be compromised for social stability

B. Political Powers and Preconditions for Reforming the Chinese Judiciary

Through my study of modern societies, I believe that the establishment of a modern judiciary in a democratic society, which complies with the rule of law, requires the following preconditions:

First, marketisation of the economy, i.e., the resources are held by the people, and not concentrated in the hands of the State. Additionally, the economy is not operated purely by the plans of the State but more in accordance with the laws agreed on by subjects of the market. Complete control of

resources by the State would inevitably lead to a high concentration of power in the hands of the government and could cause a deprivation of the rights and interests of individuals and social organisations. Marketisation of the economy will advance the development of the economy and make citizens masters of their own assets. Consequently, more and more people will become economically independent and self-sufficient.

Second, openness of social structures. People in a democratic society have more independence and autonomy. Democracy also transforms the social relations from the traditional monistic structure to a more pluralistic structure. Citizens are able to freely choose their jobs and domiciles, and participate in social organisations and various political activities.

Third, the culture in a democratic society, which complies with the rule of law, must be pluralistic and tolerant, rather than controlled, so that the culture of the country may be spread more freely.

Fourth, openness and transparency in politics. There must be freedom of speech - different opinions must be permitted to exist. The government can communicate easily with its citizens. There should be a good legal foundation in the society. The authority of the law needs to be respected by the whole society, and all legal organs must function effectively. The judicial system is independent and impartial. Citizens have a high level of legal knowledge and know how to protect themselves legally.

Naturally, there are other conditions needed for a democratic society, where the rule of law and modern judiciary prevails, however, the above conditions are imperative. The main question is whether contemporary Chinese society contains these conditions.

1. Economic structure

With respect to the structure of the economy, China is in the process of moving from a planned economy to a market economy.

After the economic reforms of the past 25 years, particularly the establishment of a market economy in the 1990s, the Chinese economy has progressed towards the market economic model. The mandatorily planned sector of the economy has decreased from 95% before the reforms to 5% at present. The prices of 90% of the means of production and 95% of the means of subsistence are

now determined by the supply and demand of the market.[456] Moreover, the scope of the market has been extended from means of production and subsistence to, inter alia, capital, technology, labour force, equity shares, real estate, securities and futures.

At the time of the marketisation of the economy, shares of non-state-owned enterprises had increased. A comparison of the situation in 1978 to that in 1997 shows that the gross output value of non-state-owned enterprises increased from 22% of GDP to 70% of GDP, among which the gross output value of individual and private industrial economy reached 30.8% of GDP.[457] Investments made by non-state-owned enterprises in fixed assets reached RMB l, 200 billion Yuan, which was close to that made by the state-owned enterprises. The increase in the index of the gross industrial output of state-owned economy is 106.1, collective ownership is 119.8 and individual and privately-owned economy is 122.4. There are more than 27 million registered individua1 industrial and commercial operators nationwide and 0.81 million privately owned enterprises. The total registered capital of the above individual operators and private enterprises are RMB 600 billion, with their employment figures reaching more than 61 million people.

With the development of the economy during the past 24 years, the degree of industrialisation in China has greatly increased. The agricultural output value of the country has multiplied by 13 and the output value of industry has multiplied by 18. The percentage of agricultural output value in the GDP of China decreased from 28% in 1978 to less than 20%, and the proportion of output value of the industry and the service sector in the GDP increased from 72% to more than 80%.[458]

Simultaneously, the economy of China is in the process of internationalisation. The total value of China's imports and exports increased from US$20.6 billion in 1978 to US$325.1 billion in 1997. This is almost 17 times the original figure. The foreign exchange reserve of China has reached US$39.9 billion and the tota1 amount of foreign investment in China reached more than US$380

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[456] Economic Institute of Beijing Normal University, *Report of Development of Chinese Market Economy in 2003* (2003) 36 <http://www.china.com.cn/chinese/zhuanti/306711.htm> at 16 October 2005.

[457] The national gross output value of the industry in 1978 was RMB 423.7 billion yuan, among which the gross output of the State-owned industry was RMB 328.9 billion yuan, the collective ownership industry was RMB 94.8 billion yuan and the private ownership was zero. In 1996, the national gross output value of the industry was RMB 9949.28 bi1lion yuan, among which the gross output of the State-owned industry was RMB 2868.29 billion yuan, collective industry was RMB 401673 billion yuan and private industry was RMB 3064 .25 bi1lion yuan. See The State Statistics Bureau, *The Statistics Communique of National Economic and Social Development of the PRC in 1978* <http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/t20020331_15372.htm> at 16 October 2005. The State Statistics Bureau, *The Statistics Communique of National Economic and Social Development of the PRC in 1996* <http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/t20020331_15391.htm> at 16 October 2005.

[458] The State Statistics Bureau, *The Statistics Communique of National Economic and Social Development of the PRC in 1978* <http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/t20020331_15372.htm> at 16 October 2005. The State Statistics Bureau, *The Statistics Communique of National Economic and Social Development of the PRC in 2003* <http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/t20040226_402131958.htm> at 16 October 2005.

billion.[459] All these figures show the close relationship between the Chinese economy and the international economy.

The marketisation of the Chinese economy indicates that the centralisation of the economy in the hands of the government under the former system has gradually dissipated. Pluralism of the economy also requires pluralism of political interests, and this pluralism is the basis of democracy and the decentralisation of powers required by a constitutionalist society. The internationalisation of the economy and China entering the WTO made sure that China's governmental policies were exposed to international influence and scrutiny. Consequently, adjustments will be made to the structure and policy-making mechanisms of the Chinese government.

2. Social Structure

Regarding the social structure, a non-government society is appearing in China. 'Nationalism' is one of the features of the traditional Chinese society, that is, the State was the centre of the society and all citizens were screws in the State apparatus. Therefore, the structure of the traditional Chinese society was monistic. Within this structure, the government directly faced individuals and could effectively control them. After the reforms, a society that is becoming increasingly independent of the government is emerging – this is shown in the increasing number of privately owned enterprises, non-government associations, private schools, legal firms, accounting and evaluating firms and their associations, commercial chambers and consumer associations. Another feature of traditional China was the levels of status in society. Dependent relations between individuals and their work units and the government resulted in a monistic society structure. In society, every person was assigned to a unit (such as government offices, schools, enterprises, production team) or in a certain region (either urban or rural), and lacked the freedom to transfer between units. A citizen would not have survived had they left their unit.[460] The changes to the social structure, and the growth of the non-government society, have greatly weakened the government's control over the people; the amount of individual freedom in society has increased significantly. As a result, the opportunities for individuals to choose how to live their lives have also increased.

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[459] The State Statistics Bureau, *The Statistics Communique of National Economic and Social Development of the PRC in 1978* <http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/t20020331_15372.htm> at 16 October 2005. The State Statistics Bureau, *The Statistics Communique of National Economic and Social Development of the PRC in 1997* <http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/t20020331_15392.htm> at 16 October 2005.

[460] Salaries, food and registered permanent residence of citizens were all controlled by their working units. It was a very complex process to change one's job or dwelling place, particularly as jobs were allocated by the State.

Poverty was a major cause for revolution in China. For a long period of time, the majority of Chinese people were very poor and possessed little, if any, property, and this led to revolts. After the founding of the new China, the Chinese government solved many of the poverty problems, and was able to provide food and clothes for the majority of the Chinese people. However, until several years ago, the Chinese people owned no private properties aside from those needed for basic subsistence. Twenty-four years of reforms greatly increased the wealth of the Chinese people, resulting in the formation and rapid growth of a middle class. This middle class consists of individual industrial and commercial operators, proprietors of private enterprises, shareholders and senior management officials of enterprises with foreign investments, persons engaged in the fields of culture, arts, media and publishing, teaching, research, banking, information technology, real estate, and professionals such as lawyers, doctors and accountants. With the reforms of the housing allocation system and the transformation into joint stock companies of non-corporate enterprises, city dwellers became owners of their houses and some employees became shareholders. Thus, the number of privately owned properties in China was growing rapidly, as was the number of Chinese people in ownership of property.[461]

The changes in China's social structure stated above show that the privatisation of property and the newly-found economic independence of the citizens strengthened citizens' sense of, and demands for, liberty, democracy and rights, and made the rule of law an inherent requirement of society.

3. Cultural Changes

In terms of cultural changes, an orthodox culture was emphasised and highly respected in traditional China.

Monistic cultures are often related to a political dictatorship. Early last century, the May 4 Movement in China,[462] moved the country into a period of cultural diversification. In 1957, the

[461] It was reported by the People's Bank that at the end of 2005, in China, there were more than 30 million people involved in the exchange of securities and the number of individual deposits into banks was roughly 14 trillion yuan. See Xiao Ming & Li Zhiyong, *14 Trillion Yuan Individual Deposits in Bank* (2006) *Xinhua Net* <http://news.xinhuanet.com/fortune/2006-01/16/content_4055913.htm> at 19 March 2006.

[462] The May 4 Movement in 1919 was the first mass movement in modern Chinese history. On May 4, about 5,000 university students in Beijing protested the Versailles Conference (28 April 1919) awarding Japan the former German leasehold of Jiaozhou, Shandong province. Demonstrations and strikes spread to Shanghai, and a nationwide boycott of Japanese goods followed. The May 4 Movement began a patriotic outburst of new urban intellectuals against foreign imperialists and warlords. Intellectuals identified the political establishment with China's failure in the modern era, and hundreds of new periodicals published attacks on Chinese traditions, turning to foreign ideas and ideologies. The movement split into leftist and liberal wings. The latter advocated gradual cultural reform as exemplified by Hu Sheng who interpreted the pragmatism of John Dewey, while leftists like Chen Duxiu and Li Dazhao introduced Marxism and advocated political action. The movement also popularised vernacular literature, promoted political participation by women, and educational reforms. See Li Kai, *Modern History of China* (1999).

CCP advocated flowering of one hundred schools of thought,[463] the purpose of which was to smash the bonds of unified thoughts and culture. However, this policy was soon prohibited and suppressed, because the Party was worried about its adverse effect on their power. What followed was a period where unorthodox cultures were criticised and excluded. During the Cultural Revolution, prohibition of different voices was followed by extreme inquisition. After the Cultural Revolution, orthodox and dogmatic ideologies such as class struggle, proletarian dictatorship, revolution through violence and personality cult were doubted by the people and lost their power. In recent years, people's attitudes toward public ownership, planned economy and distribution according to work have also undergone great changes. The diversification of economic subjects and interests, as well as a general opening up to the outside world has lead to a diversification of culture. Control of the orthodox ideology has weakened. Thought, culture, arts and politics from abroad have greatly affected various aspects of China's culture. The concepts of freedom, democracy, equality, human rights and the rule of the law are exerting an increasingly broad and profound influence upon Chinese society and it is these cultural elements that are aiding China's move towards constitutionalism.

Just as the culture has undergone great changes, so have the intellectuals. In the past, Chinese intellectuals had no independence, and were referred to as the 'fur' adhering to the skin of the proletariats.[464] Currently, the independence of Chinese intellectuals has been strengthened. They have become more and more independent, not only in economic terms but also in terms of ideology. A great number have left their studies, some have become entrepreneurs and others are independent cultural workers. Independent intellectuals are an important social force for the realisation of democracy and constitutionalism.

4. Politics and Law

With respect to politics and law, China has been undergoing an evolution from a society with centralised powers and the rule of men to a democratic society with decentralised powers and the rule of law.

China has experienced a long history of feudal autocracy. Since the Cultural Revolution, patriarchal and personal decision-making systems have been reconsidered. The system of personal arbitration has been replaced with collective leadership. An enlargement of the autonomous powers of the

[463] Mao Zedong, 'On the Correct Handling of Contradictions among the People' in *Selected Works of Mao Zedong* (1977) vol 5, 396.
[464] Mao Zedong, 'Speech at the Chinese Communist Party's National Conference on Propaganda Work' in *Selected Works of Mao Zedong* (1977) vol 5, 406.

regions has corresponded with a weakening of the centralised powers of the central government. The political life of the country has become more enlightened and transparent, the news media has become more active and the citizens are much freer to speak their minds. Before 1979, China was a country with very few laws to abide by. Since 1980, China has enacted nearly 504 laws, more than 800 executive regulations and over 20,000 local laws and regulations until the end of 2008.[465]

Currently in China, a legal system is coming into being consisting of a constitution, civil and commercial laws, criminal law, organic laws of state organs, laws on economic and cultural affairs, as well as civil, criminal and administrative procedural laws. It is true that some of these need to be revised, supplemented or even redrafted, but compared with the situation of 30 years ago when there was no law to go by or that of 10 years ago when the laws were very incomplete, this is a great improvement. Today, China has laws and regulations to go by basically in most fields of socia1 1ife and through the making and implementation of the law, have acquired much new information, and accumulated rich experience, concerning the rule of law and modern judiciary.

The functions of the laws within the society have become more and more prominent and the role of the judiciary has been emphasised. The legal reforms have given lawyers an important role in advancing the construction of the legal system. A series of principles relating to the rule of law have been established. These principles include supremacy of the *Constitution* in the legal system of the country, the supremacy of law, equality of everyone before the law, observance of the law by the government, legally prescribed punishment for a specific crimes, presumption of innocence, safeguard of human rights, legality of procedures, operating of the CCP in the scope of the *Constitution* and law, right of citizens to sue governments, and state compensation. The legal consciousness of citizens and awareness of their rights and obligations have been greatly enhanced. The rule of law has been portrayed as one of the targets of modernisation in China, which has greatly strengthened the authority of the law in Chinese society, and has advanced the overall reforms of the legislative and judicial systems in China.

After many years of reform, administering state affairs in accordance with the law and constructing a socialist state under the rule of law have been established as basic state policies in China and have had a strong ideologica1 basis among the Chinese people. In China, slogans such as 'to administer provincial affairs according to the law', 'to administer municipal affairs according to the law', 'to administer country affairs according to the law', 'to administer township affairs according to the law', 'to manage the enterprise according to the law', 'to regulate rivers according to the law', and

[465] Legislation 30 years of the People's Congress, *Study for the People's Congress*, Issue 4, 2009, P1.

'to transform mountains according to the law'[466] can be seen throughout the country and receive wide support.

At the same time, the remarkable achievements of the economic reforms since 1979 have provided a material foundation for the formation and growth of the demands for rights. The great changes in behaviours, moral concepts and social relations in both urban and rural areas have stimulated more desire for freedom and equality. Similiarly, the development of the Chinese legal system and the Movement to Disseminate Elementary Legal Knowledge during the past years have also helped Chinese citizens to express their desire and demand rights, as well as stimulate and guide the awareness of their rights. The people demand that laws and modern judiciary be adopted to protect their economic, political, cultural, social, and personal rights and freedoms. From 1993 to 1995, I worked with a group of scholars and statistical experts in conducting a survey about Chinese people's awareness of rights. The survey covers the citizens in five provinces and Beijing. Both the questionnaire and the interviews show that, compared to the past, the Chinese people's awareness of their rights has improved. Despite different experiences and understandings about rights in different economic regions, different professional, educational and social classes, they all share a clear and strong consciousness about protecting their personal and property rights using the legal method.

In addition, the fact that Hong Kong was turned over to China in 1997 and Macao in 1999 is an inevitable trend of Chinese historical development, two regions that are basically modern societies under the rule of law. The increasingly close ties between these regions and the central government and various inland provinces and cities will certainly promote the rule of law and modern judiciary in the whole country.

Furthermore, with the development of the market economy in China, the Chinese market will be increasingly linked to, and achieve a certain degree of integration with, the international market. As one of the permanent members of the UN Security Council and a member of WTO, China always actively participates in international affairs and plays 'the game' according to international rules. Up to now, it has already ratified a series of international conventions, including 17 human rights conventions. In 1997, China signed the International Covenant on Economic Social and Cultural Rights, as well as the International Covenant on Civil and Political Rights[467]. The signing of, or accession to, any international convention implies that the state will accept certain international obligations. Closer ties with the international market in the economic field and the undertaking of

[466] Ying Sonnian & Yuan Shuhong edited, *Toward the Government by Law* (2001).
[467] The covenant has not been presented to China's highest legislature to get ratified till now.

more international obligations in the political field will inevitably demand that China modify the provisions of many domestic laws so as to make them compatib1e with the international standards and learn from the legislative experience of the major countries in the world, which will result in a trend towards uniformity between the Chinese law and the laws of these countries. This uniformity is ref1ected not only in the field of private law but also in the field of public law. The safeguarding of human rights will become an important element of the rule of law and modern judiciary in China.

Finally after many years of effort, China has trained a 1arge number of legislative, law enforcement, and judicial personnel as well as lawyers and legal research and teaching personnel. They wil1 become the backbone in the construction of the modern judicial system in China.

C. The main impediments to the continuing modernisation of the Chinese Judiciary

Despite the aforementioned favourable conditions and opportunities, China is still faced with many challenges in its effort to build a rule of law society and a modern judiciary compatible with the market economy.

The current Chinese legal culture is derived from the traditional customs, meaning that there are many conflicts between the modern civilisation and the Chinese traditional legal culture. Therefore, any cultural resources that the judiciary could borrow from its ancestors are limited, while the situation that the Chinese judicial institution will face during its modernisation will be very complicated.

1. The influence from Chinese traditional agriculture

In China, the natural economy based on small-scale farming individual owners had been the dominant economic mode for a very long time. After 1840, when China was reduced to a semi-feudal and semi-colonial society, national capitalism developed slowly and bureaucratic capitalism, which had a strong dependent nature, had emerged, a semi-natural economy became the dominant economic mode of the time. After the success of the communist revolution in 1949, China implemented a product-economy in which the state played the dominant role in both production and distribution. Therefore, the development of a modern market economy in China is based not so much as on the existence of the necessary conditions as on the deepening of understanding of the legal and judicial institutions of economic development. It is a development both from top to bottom and from bottom to top. It must be a gradual process and relevant laws and the modern

judiciary must be adopted to create favourable conditions for the development of this economic institution.

Chinese society is still a kind of agricultural society to some extent, a concept suggested by a famous Chinese sociological scholar Mr Fei Xiaotong. Due to the twofold social structure of China, 75% of the population still lives in the countryside, where industry is undeveloped and agriculture is crucial to people's life. The social structure and the form of organisation in the countryside are contributing to social stability. The rural society itself has expressed a kind of contradictory attitude towards the 'exotic' modern rule of law and its agencies dealing with social disputes (the court). Although in theory the modern rule of law and the consequent new order will undermine the traditional social order, in practice it does not. The 'urban-oriented' modern judicial institution might bring a lot of inconvenience to the rural society; what's more, it might even break the harmony of the rural societies and fail to solve the problem properly or with low efficiency, because of the traditional Chinese attitudes. But along with the rapid development of the Chinese market economy and modern social life, China entered WTO, which impacted Chinese society significantly. The Chinese people's consciousness of their rights increases day by day, so that Chinese society has had to recast its construction of special trust and follow the rule of universalism.

2. The lack of recognition and confidence from the public to the Chinese judiciary

This topic is related to the idea of Belief in Law by Harold J. Berman.[468] If the judicial system wants to achieve full efficiency, it must convince the people that the legal system and judicial mechanism belong to the public; if they want people to believe and even have faith in the law, the law and judicial system must act with holiness and moral authority to consolidate that sentiment. The sacredness of the law and judicial system and the faith of the public come from many aspects of the law, including the ceremony involved in the making and implementation of the law and the emotional justice that the law reflects.

China is a country with more than 2,000 years' history of feudal autocracy; 'the rule of man' prevailed throughout that long history. The laws and the judiciary in the past were merely tools in the hands of the rulers, which emphasised government control and obligations, and ignored the rights of the people. The feudal kings and emperors often acted arbitrarily, their words were taken as laws and final judgments and, throughout the country, state laws were combined with clan rules.

[468] Harold J. Berman (February 13, 1918 – November 13, 2007) was Ames professor of Law at Harvard Law School and Emory University. As a prolific scholar, Berman wrote 25 books and more than 400 scholarly articles, including "Law and Revolution: The Formation of the Western Legal Tradition" and the "The Nature and Functions of Law," which is in its 6th edition.

After 1949, due to the influence of the product economic system, the formulation and implementation of the economic plan were still an important part of state activities. As far as the law and judiciary were concerned, the problem of putting too much emphasis on state control and obligations still existed. Even today, this influence is still reflected in the current legal and judicial institutions. Therefore, the traditional and current conditions in China result in the Chinese people becoming disillusioned with, and lacking confidence in, the law and the judiciary.

The questions of how to democratise the legislative process, how to make rights the basic concept of the law and organically combine rights and obligations, and how to make law the code of conduct applicable not only to the ordinary people, but also to the CCP and state leaders and government officials, remain to be answered in the future directions of reforms.

3. The four obstacles to judicial reforms under the current Chinese institutional conditions

Three main obstacles arise from the current political institutional arrangements, ideology and knowledge base, which have existed since the commencement of the Chinese judicial reforms.

a. The obstacle of the current Chinese constitution

The concept of the judicature and judicial power being separate from other powers, as well as the independence of the judiciary have been not been stipulated in the current Chinese constitution. The constitution states that the people's courts should exercise judicial power and are not subject to interference by any administrative organ, public organisation or individual. However, according to an official interpretation, 'not subject to interference by any administrative organ, public organisation and individual', means that administrative organs, public organisations and individuals have no power to interfere in the courts' trial work, while the CCP, the people's congress and the procuratorate may so interfere.

b. The obstacle of the entrenched interests in China's political arrangements

In the past, under the controlled economy and one party dictatorship, all resources were centralised in the hands of the CCP and the government. Consequentially, Chinese judicial power was not independent and Chinese citizens had no property rights. The reforms were designed to actually hand over the power of the distribution of economic resources from the government to the public, and to use entrepreneurs to replace the government officials on economic policy making. They also

aim to disperse political resources, returning the legislative power to the legislature and judicial power to an independent judiciary. However, the reforms in China are carried out from top to bottom and under the unified leadership of the CCP and the Chinese Government. Chinese leadership must be strengthened to ensure the ultimate success of these great and revolutionary reforms; however, the current leadership system is established on the basis of the product economic system. Therefore, in order to strengthen the role of the leadership in the reforms, China must also carry out reforms on the current leadership system itself. Its functions must be changed so as to serve the needs of the development of a market economy and judicial modernisation. Since the decisive factor in the social distribution under the product economic system is a person's position in the whole system and, even today, how high a position a person holds in the CCP and public organ of power is still an important criterion for deciding how much he should get in social distribution, the reforms on the leadership system will inevitably affect the interests of some reformers. The reforms are determined by the CCP and the government, which are the objects of the reform. It is inevitable, therefore, that there will be resistance from the Party members and government officials, directly or indirectly, which would probably lead the existing elements of the control economy remaining in place with just a name change. As a result, after 30 years the CCP and the government still wield the most control over the economy in China.

The Chinese high level leadership is the main driving force behind the Chinese reforms. However, the participants of the reforms of the 1980s would remember clearly the limited powers of the leadership, which did not give them enough authority to carry out the reforms completely. The powers are not only divided between the hierarchies but are also divided on all levels of the Party's organisation and government, making it difficult to implement the necessary reforms. Almost all departments of the Party and the government have the power of policy making and are protected. Under these circumstances, all policies must not only be approved by the high level leadership, but also must be embraced actively by all levels of the CCP organisation and local governments. According to economic reasoning, in these circumstances, policies can only be implemented when they meet the criteria and approval of all of the CCP and government departments at all levels. For this to happen incentives have to be combined with the necessary constraints. The varied demands of the CCP and government officials make it very difficult to formulate proposals that satisfy all of the requirements. The high level leadership of the reforms has to make compromises to obtain the support from the CCP and government officials. These officials also try to manipulate the reforms with compromises for their own personal gain. Because of the compromises, the reforms do not go as far as they need to.

c. The obstacle of the ideology.

The obstacle of the CCP's ideology has impacted strongly on the course of Chinese reforms. Firstly, Chinese leadership is not able to provide a clear and certain target for the reforms under the CCP's ideology. In order to avoid direct confrontation with the CCP's ideology, the reformers must use smokescreens for the real agenda to achieve the proposed reforms. This can lead to counteractive results. Secondly, this unclear strategy causes Chinese leaders to give different or even conflicting guidance or direction to the lower ranks who must then await final resolution of these matters. Therefore, many proposals are delayed and the powers of the CCP and government agencies are increased. Thirdly, the status of the reformers in China is very uncertain and vulnerable to politics. Even in recent times, it is still safest in Chinese politics to stand on the 'Left'. Those who advocate reform are always attacked by the leftists. Being aware of the dangers, the reformists have to act as cautiously as they could to stay away from the trouble, which might make them miss the best timing of reform. Some of the opportunists frequently further their own nest under the term of 'correction of the politics', which virtually adds to the anti-reform attitudes. Fourthly, under the current ideology and institutional arrangements, strategies of reforms could not be discussed openly in China, therefore it is very hard for reformers to receive necessary advice, which increases the risks to the reforms in practice. In addition, scholars of areas other than economists were unable to participate in discussions or contribute their knowledge, which, in some cases, pushed them into the reform-criticism faction. In fact, Chinese leaders avoided arguments by using the 'no discussion' shield; however, this method is only suited for power politics, which had passed in China. Finally, the relevant political reforms in China could not match the economic reforms, because of the control of official ideology. As a result, some parts of the reforms could not reach their goals.

Chinese judicial reforms could be held as a typical example. Without ideological control, people can discuss the reforms openly. When ideology cannot be used as an excuse and different opinions can be proposed without hesitation, a relatively thorough plan can be made that includes the ultimate goals. Unfortunately, the Chinese society has had ideological restraints from the oppressive nature of the CCP's leadership and therefore, Chinese judicial reforms are usually carried out by local courts secretly.

During the course of reforms, the Chinese leaders and academic scholars constantly attempted to get rid of the obstacles from traditional ideology by using slogans such as 'creation of the theory', 'Theory of the Elementary Stage of Socialism', 'Chinese Style Socialism', and the 'Three Representatives'. More adventurous innovations are needed to break the control of ideology.

Chinese people lack a consciousness about human rights and the rule of law, they lack respect for the law and judiciary, and are influenced by the traditional idea of the judiciary. As mentioned above, throughout Chinese society's history, there have not been concepts of human rights, the rule of law and judicial independence. According to this traditional frame of mind, the main purpose of judicial justice is to reduce crime through the deterrence of the law, namely severe punishment.

According to the Chinese official ideology, the judiciary is a tool of class oppression; it is used by the exploiting classes to oppress the exploited classes. It has been used to intimidate or terrorise the people to make them submit to domination. This has resulted in a deep-rooted disrespect of the judiciary within the Chinese society. Many people do not hesitate to break the law if they think they can escape punishment for doing so. This partially explains why despite the fact that there are a large number of laws in Chinese society, a lot of unlawful acts are widely practiced. Another obstacle is that the elementary principles of the rule of law and a modern judiciary are regarded as capitalist ideology and have been resisted by the official Chinese ideology. The Chinese government has often criticised western countries for using human rights as a tool to interfere in Chinese domestic affairs.

d. Obstacles from lack of knowledge.

It was not easy to make a proposal for the transition of Chinese judicial system, from the traditional to the modern. Most Chinese people did not have experience of a market-oriented economy or the rule of law, and so these were two topics that were very new to them. Even the leaders of the reforms, politicians and economists did not have clear ideas on the running of a market economic system and a modern legal system. Chinese economists and legal scholars could only learn the theories from text books and therefore did not have any practical experience. The senior scholars may have been able to answer questions why China needed reform; however, they could not give an answer on how China was to reform. In the middle of 1980s, the young generation of economists and legal scholars became more active in China. They tried to ignore the constraints of the official ideology and work on the more practical subjects. Therefore, 'capitalism' and 'socialism' are mentioned less and the scholars focused on how to improve the operations of the economy and the legal system. Most of these people commenced their reform contributions in 1984 and some of them even began to participate in the design of the scheme. Unfortunately, the scholars were naive to the fact that they had no real capability to influence and change the CCP and the government hierarchy.

The combination of these four obstacles exacerbates the difficulties of Chinese judicial reforms. For example, government officials will use as an excuse the argument that the scholars do not have full knowledge and understanding to implement a practical reform strategy, allowing them to disapprove or change the reforms for their own benefit. In addition, because of ideological constraints scholars cannot explore or further develop their own knowledge base. Arising from the inadequate knowledge base, which is one of the constraints, the ideological constraint is exacerbated further.

The above issues reflect an inadequate protection of civil rights. The judicial system should represent an adequate and complete protection of the civil rights of all people, including protection from misuse of the judicial system and violation of civil rights. These goals should be the priority of any judicial system.

D. Overall Goals for the Modernisation of the Chinese Judiciary

The modernisation of the Chinese judiciary is a historical course that goes along with the transition of Chinese society. The current judiciary and its operating system will experience huge, essential changes during the procedure of transition. The basic aim is for the judicial institution to be able to accommodate the requirements of social development and transformation, and also reflect the values and goals of a modern society.

Accordingly the main characteristics of the Chinese judicial modernisation could be summarised as:

1. The transition of traditional to modern judicial system should be of historical significance encompassing the whole judicial system.

2. It is a kind of historical progress that all of the countries of the world have experienced or will experience sooner or later, characterised by the individual experiences of each country.

3. This historical procedure transfers the theoretical target into a practical reality. There should be a set of universal standards that reflect the expectations of the society pursuing judicial modernisation. The task of the modernisation is to convert these expectations into reality.

It has been argued that China's modernisation is one part of the process of global modernisation. Therefore, it is not a complete natural evolution of Chinese society. Actually it is the Chinese nation choosing to save itself from extinction. The rapid global modernisation has forced China to

pass internal and gradual reforms as the modernisation of Chinese society was essential for China's future survival. This has, in turn, forced the Chinese judiciary to undertake external and rapid reforms as discussed in chapter 5. Reforms have been a complicated issue with Chinese intellectual people and officers who have sought reforms since the end of the Qing Dynasty. It seems that it is a more important feature for the Chinese judicial modernisation to build a modern judiciary effectively through emphasising 'change'. China's knowledge base cannot cover all of the issues associated with social and legal activities and therefore they cannot build up an effective modern judiciary purely based on the ideal model or current knowledge base. In addition, the formation and operation of a judicial institution must fit into the reality of a society; as a result, China cannot just copy a model from western countries and expect it to work. Furthermore, as the Chinese market economy has its own characteristics differing from western experience, the judicial modernisation should also have its own characteristics, particular in regards to the Chinese reforms being carried out from top to bottom. It is reasonable that to allow the government the control of the reforms of economy and society, i.e. in Chinese society, the judicial modernisation driven by the government is more realistic.

In modern societies, democracy and the rule of law are accepted by the majority of people, and China is now no exception. Democracy and the rule of law not only represent a kind of political system but also political rights and protections. Accordingly, the understanding of democracy, the rule of law and the pursuance of a modern judicial institution are related to the position and demands of individual rights and liberties.

Therefore, in my opinion, the Chinese judicial reforms should pursue unhesitatingly towards the goal of modernisation, while also making the most of Chinese local resources. The institutional transplant is more difficult than the technical transplant, because one effective institutional arrangement relies greatly on the other institutional arrangement. From a political point of view, judicial reforms must affect the whole institutional arrangement; its final success depends on the improvement of the whole political institution, so it will be more knotty. As far as Chinese society is concerned, the understandings of democracy, the rule of law and modern judiciary are different; the most obvious arguments are represented by two main factions of people.

The first group is deemed the weaker group, i.e. the people less satisfied with their current environment and with less hope for the future. Most of those people are poor peasants in rural areas or working as coolies in cities. This group also includes the rural and urban unemployed and young people just entering or trying to enter the workforce. These people are struggling to survive and find

employment, and must face the growing divide between rich and poor. Realisation of the differences between their ideals and the reality of their situation has diminished their confidence in their future. Consequently, they have negative attitudes towards the current social order that are making any unforeseen changes to this situation welcomed. They support the democratic campaign from bottom to top. In their opinion, democratic change is a chance for them to broaden their civil rights and improve their future. They also believe it would be a reversal of the current unreasonable distribution of benefits. An increasing number of disillusioned people is a dangerous social element. Those who have lost their expectations in and of life may take revenge on society through irrational and extreme solutions. This group of people are the most difficult for of the CCP and the Chinese government to handle as they are not be afraid of confrontation or of expressing their ideals, which puts pressure on social stability.

The second group of people, who have an understanding of democracy, rule of law and modern judiciary, are the social and economic elites, as well as people aspiring to political careers. There are leaders and followers in all societies. These elites have already acquired certain benefits in life and democratic change, in their eyes, would not involve relinquishing any of these benefits. As a result these people differ from the first group, who want a complete deconstruction of the current social order. The elite only wish for a partial deconstruction concerning the current benefits. They do not want complete equality with working classes but want to consolidate their existing benefits through democracy, the rule of law and modern judiciary. Of course, different types of elite receive different benefits, which represent different interest groups that cause different attitudes in understandings of democracy, the rule of law and modern judiciary.

The above two arguments on democracy, the rule of law and modern judiciary would bring about different outcomes to the reforms and judicial modernisation in China. Once China begins the process of change to democracy, the rule of law and modern judiciary, this may divide these two groups from the current shared goals. This may also cause rivalry and competition for the benefits of change. It is very hard to anticipate the result of this competition as there are many specific or random elements that may determine the outcome.

If the first group of people gained an advantageous situation, their demands would increase and will result in a continuing revolution in China, which may finally result in a repeat of the Cultural Revolution. The achievements of the Chinese civilisation would be destroyed, along with the social order, bringing about a repeat of history.

If the second group won, it may not be a repeat of history, but the beginning of a new era. As far as the institution is concerned, the new institution has some advantages over the old, but only to bring about a better future outcome. The basis of the political institutional structure not only contains the political institution, but also other elements such as economic, legal and cultural elements, which also influence the political structure and people's lives. During the reconstruction of the social system there must be a demolishing of certain cultural, economic and political systems. They must all experience reconstruction but there will be different amounts of deconstruction in each element. The fight between the workers and the elites will inevitably result in conflict. Therefore, even if the elites win the fight the democratic outcome will be determined by the resolution between the winners and losers. The relations between the new leaders and the other classes of society, the international situation, and foreign attitudes towards the new leadership, are all crucial elements.

Thus, it can be seen that the procedure of democratic change and modernisation may bring a bright future or a challenge of civil unrest to China. Even with the best results and changes, it will take a relatively long time for internal adjustment. However, China is experiencing a strategically challenging period, continuing economic development and foreign competition for markets makes new reforms necessary.

Under the conditions of the current institutional arrangement, economic development is regarded as the criteria for the legality of the current social order. If the economic development under the current social order cannot be maintained then the case for abandoning democracy and political modernisation would lose half of its support. The other half of the support would be lost if the danger of social unrest is averted, i.e. social order have the priority over freedom. Even if this was the case, there would be only a small possibility that the CCP and Chinese government would take initiative to commence reforms. The stability of the current social order is based on the contrast of powers between the state which is strong and the people who are weak. Some mild and limited proposals of reform, such as setting up a union of workers and farmers and increasing freedom of speech, which do not look like a deconstruction such as free elections would still change the situation of maintaining the current institutional arrangement.

Once powers are concentrated in the civil organisations, who knows whether they would have more demands or not? Because of the changes, the CCP and Chinese government might lose part of their control on the people, which would mean that sometimes the Chinese government may be forced to compromise. This is why the Chinese leadership crushes any dissent or criticism of the CCP and the government as soon as it appears. This is also one of concerns why the CCP and the government

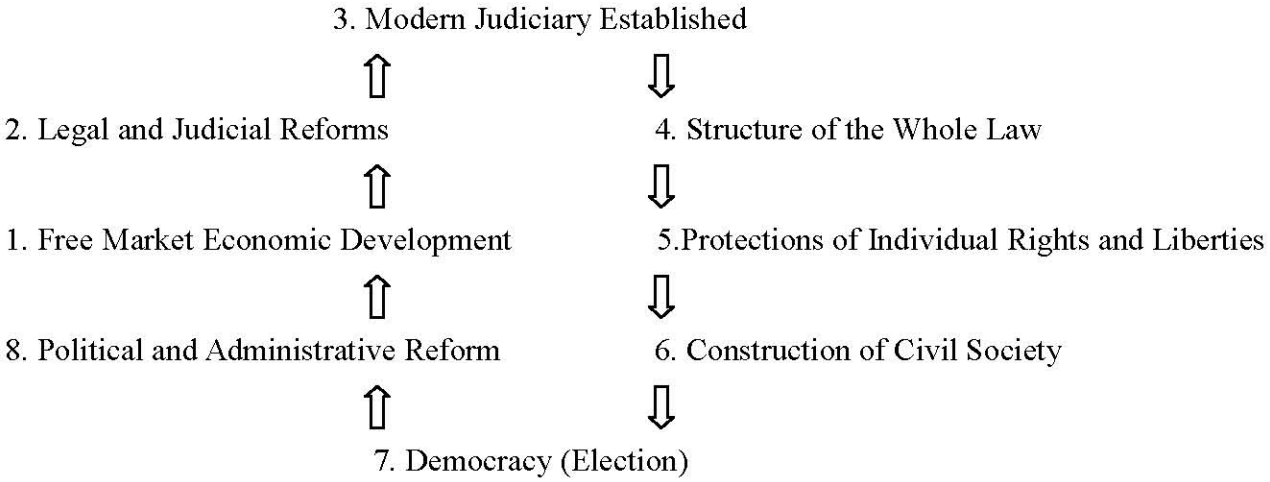
would hesitate to commence any political reforms, no matter how mild they are. The CCP and the government has been reluctant to initiate top-down reforms for the reasons explained. Political progress has been pushed by the bottom-up forces and external pressures.

Even under these circumstances, the campaign for freedom of individuals and social liberties has still made some progress, a fact recognised all over the world. Civil communities now have more powers than before and there are more and more private organisations. There are two main reasons for this success. Firstly, the areas that people have more freedom in now are mostly those areas that have with a weak connection to the current political order, which means the CCP and the government were not so afraid of the changes. Secondly, and more importantly, democracy has become a trend that the CCP and the government can no longer ignore. The development of a market economy would affect all aspects of the society and so the Chinese government must keep a balance between the control of freedoms, which causes slow economic development, and rapid economic development which increases individual and social liberties. To some extent, this style of political progress in China is the real footstep of history. This kind of reform is derived from the nature of Chinese society and is related to the Chinese current situation. Accordingly, nothing can crush it and its development could not be stopped. The absolute ideal society cannot be gained in real life; everything we have is relatively good or bad. Therefore, most societies are improved step by step, while improvement by turbulence is rare. So idealists should realise the situation and work with reality.

From the above analysis, I propose a model of developing democracy, the rule of law and a modern judiciary in China. This model is based on the development of a market economy that brings significant and qualitative changes to the relations of production and property. These changes would incur the relative alteration in the social superstructure including political, legal and cultural structures, which would make the Chinese government commence reforms to adjust their institutional arrangements to accommodate these huge changes in economic and social structures. Legal reforms and judicial modernisation are crucial to the whole scheme. The setting up of the modern judiciary should become the basis of the rule of law, because it is only when people trust the judicial institution, that the rule of law can be achieved. The rule of law could then protect people from any infringements of their civil rights and liberties, and safeguard the construction of a civil society. Furthermore, based on the setting up of a civil society, civil organisations would have their opinions on public policy making, and be able to improve and accomplish a democratic and modern political system.

In current China, under the CCP's ruling, establishing a modern judicial institution in particularly judicial independence would be regarded as the first step and basis for reforms on the social and political structures. As a result, the cornerstone would be established as a solid base for further reforms and would be helpful in avoiding social unrest, and help to carry out the most important and difficult part of the modernisation – political modernisation. Here the good examples are Singapore and Hong Kong. Both Hong Kong and Singapore are ethnic Chinese majority city-states and former British colonies and also to rule by the one party, no democracy like the western countries. However, their judicial independence was established to maintain the social stable and development. Such as in Hong Kong, the residents are enjoying the liberal freedoms of the United Kingdom, but, as a colony, without the power to choose its leaders. This contradictory state of affairs was inherited by the People's Republic of China when it resumed control of the territory in 1997. Therefore, even no democracy in Hong Kong, but there is a modern judiciary that is independence from other powers to keep the human rights and freedom.

Table 8 – 1: The following diagram explains the model:



E. Prospects for Future Reform of the Chinese Judiciary

In the past 30 years, Chinese society has gone through unprecedented and profound changes with respect to its economic, social, cultural, political and legal systems. These changes have been aiding in the transition of Chinese society from a traditional society to a modern one, and are also laying a foundation for democracy and the rule of law in China. Additionally, based on an analysis of the current conditions, it is possible to believe that China is moving towards the inception of a modern judicial system.

However, it is important to note that the reforms taking place in China will not necessarily lead China into a society ruled by the law. The current institutional arrangement in China is a strong barrier to these reforms. The rule of law and a modern judicial institution have not been established completely and because of this China is still under a one-party dictatorship or the political supremacy of the CCP. As many western scholars have realised, the current political and institutional arrangement of China and lack of public liberties clearly stunt Chinese legal development. They realise, correctly, that unless the political system is reformed, law in China will not have the value which it has in the West.[469] Stanley Lubman, a famous scholar of Chinese law in America, states that the judiciary is not independent, not when it comes to the Communist Party; which makes the Chinese legal system, not a rule of law.[470] Jean-Pierre Cabestan, another researcher of Chinese law, also espoused that risk, setbacks and difficulties will continue to be present and will prevent China from establishing a truly independent judiciary and what is universally called a rule of law. Because of that, an adaptation in China may not directly challenge the political leading role of the CCP.[471]

In fact, for a long time, the challenges to the authority of the *Constitution* and the law came mainly from the party policies and officials. The party's policies were considered more important than the *Constitution* and laws, and the party's institutions and organisations had more authority than the State legislative and judicial organs. This situation lasted so long that the consequences to society were extreme. As mentioned previously, under the one-party dictatorship system, no matter what the leadership of the party is, it is impossible to establish true democratic constitutionalism and a rule of law society. Therefore, constitutionalism in China cannot be realised without serious reforms to the current institutional arrangement. The conditions are ripe for political and legal reforms – it is just up to China to make the most of its opportunities.

As I mentioned previously, Chinese judicial modernisation is to relate to the whole institutional arrangement. For increasing efficiency and reducing misplay, the Chinese judicial modernisation should keep to the principles of holistic understanding and gradual push. The holistic understanding means they need to nail down clearly the goal and framework of the reforms and this will help to shun or reduce blind reforms. The gradual push means the judiciary has to be reformed step by step in order to reduce resistance and thus ensure the reforms' success. In other words, the current

[469] K.Zweigert & H.Kotz, *An Introduction to Comparative Law* (1998) 294.
[470] Stanley B. Lubman, *Bird in A Cage: Legal Reform in China after Mao* (1999) 297. Another scholar of Chinese law in America, Randy Pereenboom, has also done much research on Chinese legal reform. Interestingly, he thought China's 'socialist rule by law' qualified to be called 'the rule of law' or a 'thin rule of law'. Randy Pereenboom, *Asian Discourses of Rule of Law* (2004).
[471] Jean-Pierre Cabestan, 'The Political and Practical Obstacles to the Reform of Judiciary and the Establishment of a Rule of Law in China' (2005) 10 *Journal of Chinese Political Science* 43.

Chinese developing judicial reforms for achieving modernisation should have a holistic institutional plan, and as well, resolve the primary concrete problems.

1. The holistic target of Chinese judicial modernisation

According to common experiences of the world communities and specific Chinese conditions, the holistic goal of Chinese judicial modernisation may be listed as the following:
a. Separation of powers and judicial independence.

In my point of view, judicial reforms are an important part of political institutional reforms, so it must be considered in the whole framework of state powers. Therefore, the key point of the judicial reforms is to entrench judicial power in the framework of state powers, and to fix the judicial position in the constitution.

Firstly, sovereignty is vested in the people in the constitution. The laws should express the wishes and interests of the people; the legal system and judiciary should be based on a democratic political system; democracy should be realised by the leadership of the country, real protection of democratic rights through judicial institution, democratic distribution of state political power, fairness and justice of democratic procedures and reasonableness of democratic means.

Secondly, through the reforms, the constitution must confirm and reflect the separation of powers and the maintenance of judiciary independence. Additionally, the judiciary must avoid illegal interference by any organisations including parties, legislatives and administrations and individuals. The reforms must guarantee just, honest and highly efficient judicial hearings of cases, as well as the establishment of an effective system of supervision both from the inside and outside, an upgrading in the competence of judges and a perfecting of the juridical organs and procedures.

Thirdly, the CCP shall comply with the law. This particular problem does not occur in the western countries. The CCP is China's governing party, and the law and judiciary perform under the CCP's leadership, even in respect to judicial reforms. Li Peng, former Chairman of the SCONPC, said that the judicial reform is to strengthen the CCP leading judicial affairs, is to consolidate the socialist democratic and legal system, and is to perfect the system of people's congress.[472] This view revealed that the CCP is attempting to limit judicial reforms concentrating on obstacles to the effectiveness of the current system without addressing its faults. Therefore, it is crucial in the

[472] Li Peng, A Speech in the National Judicial Civil Trial Conference, *Bulletin of the SPC of the PRC* (2000) vol 6, 40.

modernising of the Chinese judicial institution that the organisations of the CCP at various levels act in conformity with the constitution and law. Furthermore in order that the CCP meet the needs of reform and open up to the outside world, and meet the needs for a free market economy and a society of the rule of law, the CCP must respect the authority of the law and the judiciary. Thus, reforming the political system and changing the CCP's leading role is a very important theme in the process of Chinese judicial modernisation.

Fourthly, law and judiciary should have supreme status. The supremacy of the law and judiciary are a reflection of the protection of the supremacy of the people's wishes and interests. The principles of the supremacy of the law and judiciary may be applied to all organisations and individuals. Its core idea and fundamental spirit is against the supremacy of individual powers of minority leaders and is against powers above the law and judiciary.

Finally, a complete and proper legal institution provides a legal framework of judicial modernisation. A complete and proper legal institution requires the establishment of a legal system with laws that cover every aspect which like the Chinese idiom says casts a legal net with large meshes but which allow nothing through. The law should be classifiable reasonably, level of legal effects are clearly distinguished and substantive laws have corresponding procedure laws, and harmonised structure that different branches of law cannot contradict or overlapping with each other; with scientific forms such as well – defined concepts, clear logic, standard name of law, reasonable setting of the effective date and ways of being introduced to the public; and with coordinated development, such as coordination with policies and the reforms. They shall be wise with perfect contents and forms governing every aspect of the social life.

b. Exercise of judicial functions.

A modern judiciary should bring its multi-functions into play in wider social life.

Firstly, the protection of human rights is the value of a modern judicial institution. The law and judiciary protect and adjust the interests of the subjects of law mainly through the rights and obligations established by law. The questions of rights and obligations are actually questions of human rights. Legal right is the legalisation of human rights. To fully and completely realise and protect human rights should be the fundamental purpose of modern law and judiciary.

Secondly, a balance of powers is the basic function of judicial modernisation. In the field of public

law, rights and obligations are reflected through powers and functions. Balance of powers refers to, according to the principle of power decentralisation, the reasonable distribution of power between the governing party and the state institutions, between the government and the social associations, among enterprises and social associations, between individual leaders and group leaders, between the central government and the local governments. It also refers to the restriction of powers by law and judiciary, by rights and interests and by power with the purpose to prevent and eliminate power abuse and power corruption.

Thirdly, the executive administration acts in accordance with the law. With the rapid development and complex changes of modern economic, scientific and technological, political and social lives, state executive functions tend to have large mandates. Therefore, executive administration in line with law and judicial review are important standards of a country ruled by law. Executive administration requires that all abstract and concrete executive actions shall be in compliance with law and be reviewed by the judiciary.

c. Proper procedure should be entrenched

Legal procedure is the lifeline of law and judiciary. Fair and just legal procedure reflects the justice of the law and the fairness of the judiciary. It is an important guarantee of scientific formulation and implementation of law and adjudication. It is a common practice of western countries ruled by law that much attention is paid to the fairness of the legal procedures. In China, under the specific historical and present conditions, much attention is given to substantive law rather than to procedural law. It is necessary to list proper legal procedure as one of the fundamental standards of a country ruled by law. The proper legal procedure includes democracy, openness, justice, strictness and impartiality.

Equity of the law and its application are also important for proper procedure, including the equity of distribution and in legal procedure. Substantive law should reflect the material and spiritual wealth created jointly by the society and protects their equitable distribution among all members of the social community. Procedural law should reflect and guarantee that all people are equal in front of the law and in civil, criminal and judicial review actions, the plaintiff and the defendant are equal in terms of their status in procedures and in terms of the law applied.

2. The immediate measures that need to be taken in the near future for the Chinese judicial modernisation

Under the current circumstances of China, judicial modernisation has faced many tasks that are quite complex. But from the angle of operational research, the immediate measures for Chinese judicial modernisation, that should be taken and which also could be accepted by Chinese leadership, include the following:

a. The People's Congress's supervision on judicial business should be stopped.

Case supervision by the People's Congress means that at all levels the congresses supervise judicial actions in concrete cases.[473] Should the case supervision by the people's congress be encouraged and spread over the country? I believe the answer is no.

The main arguments for the case supervision of people's congress in China are as follows: (a) There are Constitutional grounds for case supervision of the People's Congress; (b) current judicial corruption is very serious, so it is an effective and necessary way for the Congress to supervise cases in order to control corruption; (c) It is good for the improvement and enhancement of judicial standards for the People's Congress to supervise judicial activities. Nevertheless, in my point of view, these arguments are untenable.

Firstly, there is no constitutional ground for the case supervision by the congress. The Constitution stipulates that the National People's Congress and its Standing Committee exercise the legislative power of the state[474], and that the people's courts exercise judicial power independently[475]. According to the Constitution, the National People's Congress and its Standing Committee's supervision over judicial acts is as follows: (a) National People's Congress elects and removes from office the President of the Supreme People's Court. The Standing Committee of the National People's Congress appoints or removes, at the recommendation of the President of the Supreme People's Court, the Vice-President and Judges of the Supreme People's Court, including the members of its Judicial Committee and the president of the Military Court. (b) People's courts at various levels are responsible to the organs of state power (namely congresses at various levels) which create them, and report their work to the organs of them. (c) The National People's Congress and its Standing Committee may, when it is necessary, appoint committees of inquiry for specific questions and adopt relevant resolutions in the light of their reports. All organs of state, public

[473] It is reported that some People's Congresses at local levels have passed the rules on the local congress's supervision procedures on the individual cases. Cai Dingjian, A Basic Complexion of the Case supervision by the People's Congress, *Lawking.Net* <http://www.lawking.com.cn/articleview/2006-8-23/article_view_1945.htm> at 23 Dec 2006.
[474] *The Constitution of People's Republic of PRC (1982)*, Article 58.
[475] Ibid, Article 126.

organisations and citizens concerned are obliged to furnish necessary information to the committees of inquiry when they conduct investigations. However, the Constitution and laws do not at all provide that congresses at all levels shall supervise the concrete judicial process, namely case supervision. The case supervision of congress in such a way must interfere with the judicial procedures, and upset the balance and division of functions and powers of the legislative, administrative and judicial organs. For this reason, the case supervision of congresses is not implied in the Constitution.

Secondly, case supervision of congress violates judicial independence and fairness, and runs counter to the general trend of judicial reforms in China. The general trend of judicial reforms is to further the judicial independence and fairness by improving the relevant legal systems. In China, judicial independence and fairness means now that people's courts exercise the trial power independently and fairly. But the case supervision of congress will in essence split, scramble for and even substitute the functions and powers of judicial organs. If we recall the history of political systems, and consider the backgrounds in which the judiciary has become independent step by step, and pay attention to the reality of judicial independence in developed countries, we may draw the conclusion that judicial independence is a historical necessity, and is a necessary guard of judicial fairness.

Thirdly, the case supervision for the People's Congress is not a just way to prevent the existing judicial corruption. Some people may argue that the judicial corruption now is so serious, that we must add a new supervision to judicial actions, particularly the case supervision by poeple's congresses. We cannot deny that there are a few successful examples of case supervision by people's congress or question the motives of the deputies and officials of people's congress in every instance of case supervision. However, human experience shows that every person has in their nature both good and bad tendencies. We have no reason to have more faith in deputies and officials of the People's Congress than in judicial officials. If our legal system is not good enough to prevent corruption in the judiciary, then it is not good enough to prevent corruption in the case supervision of the People's Congress either. The ways to prevent judicial corruption rest in judiciary itself. Additionally, judicial business is one kind of professional work, and judicial officials must be well-trained lawyers. Deputies and officials of People's Congress are not all lawyers, so we cannot believe that they are better at legal proceedings than judicial officials. At the same time, there are not enough reasons to make us clear up the doubt that few deputies and officials of the People's Congress are prompted by self interest and driven by the quest for power. In the special situation of China, the case supervision of the People's Congress may transfer the focus of actions to the People's Congress, the judiciary may become another 'Rubber-stamp'. In the Cultural Revolution,

when the public prosecution organs were removed and judicial procedures were cancelled, thousands of framed and wrong cases were generated every year. We should never forget that historical lesson.

b. Transforming the method by which the CCP exercises leadership over the judiciary into one of policy formulation.

The CCP's leading role and authority over the judiciary in China is a current reality. Hence we should explore a way for the Party's leadership over the judiciary to be transformed from overall direct control to the control of policy.

The party's leadership in the country should be a political rather than vocational. Political leadership means that the Party leads the judiciary in policy-making and law-making. Vocational leadership means that the party leads the judiciary in directing its activities in individual cases. The Constitution provides that 'Under the leadership of the Communist Party of China…, the Chinese people of all nationalities will…'.[476] On the other hand, we could also see that the Constitution provides that the judiciary exercise judicial power independently, and all political parties in the country must take the Constitution as the basic standard of conduct. The Constitution has already vested the judiciary with full judicial power, hence the Party should not interfere with this even though it is the ruling party.

Apparently, there are some malpractices of vocational leadership of the Party over judicial acts. First, it will disturb the procedure of actions, and absolve the judiciary from professional responsibilities. Meanwhile, the Party will not be responsible for the judicial business, which would put law and order in danger. Second, it will result in judicial corruption. One of the basic causes of judicial corruption is that decision-makers and judges have power without corresponding duties. The Party's interference with the judiciary will also give the party leaders opportunities to abuse their power, because there are no rules or procedures on the Party's interference.

The Party's political leadership of judiciary excludes vocational interference. It is an indirect leadership, which is realised through the policy-making and law-making. However, it still may influence all aspects of judicial business, and even interfere with the independence and fairness, if the country do not take any other measures. China's basic institutional arrangement should be reformed so that it meets the needs of the rule of law and modern judiciary, as discussed previously.

[476] Ibid, Preamble.

However it is impractical to abolish the Party's leadership in judiciary in China at the moment. I believe that the establishment of the Party's working committee in the supreme judiciary to realise the Party's leadership of judiciary as a compromise for a gradual judicial modernising. At present, there are two ways to exercise the Party's leadership over judiciary in China. One is the Party member group in the supreme judiciary, which is assigned by the Central Party Committee. The other is local party committees at corresponding levels. In my point of view, the two ways should be changed into one new way: the Party's Working committee exercises the Party's leadership in the judiciary on behalf of the Central Committee of the CCP, so local party committees must not exercise the Party' s leadership of judiciary.

The Party Working Committee is established in the highest judiciary, namely the Supreme People's Court, whose branches are in local judiciaries. This way, the judiciary can eliminate the CCP local committee's interference with judicial actions so as to guarantee judicial integrity and unity. In this way, the judicial organs must be improved and well-arranged because the party working committee will elect leaders of judiciary at all levels from inside the judiciary, so the layman cannot come into the leadership of judiciary. Therefore, a special system of judicial personnel will take shape progressively; the existing administrative style system of judicial personnel is bound to pass away. That is the basis for improvement of the professional quality of judicia1 officers. By this way, the judicial modernisation could be pushed step by step until achieving the final goal.

c. Reforming the financial system of the judiciary to ensure financial independence.

Judicial business expenditures, capital construction expenses, equipment spending, and the wages and salaries of judiciary can be generally referred to as judicial spending. My opinion is that the judicial spending shou1d be included in the state budget just like specia1 military appropriations.

In the aspect of judicial funds, there are a lot of historical lessons. About 200 years ago, English judges' salaries depended on fees. An arrested person even had to pay a fee to the justice who granted him bail. Since the Middlesex Justices Act of 1792, the magistrates were paid an official stipend and were prohibited from taking any fees. But the stipend was comparatively small, most magistrates were utterly incompetent to discharge their duties, it was inevitable in that period the magistrates were inf1uenced by patronage and graft. Gradually, however, as the salary was increased, the standard improved, and although there was no statutory requirement that police magistrates shou1d be legally qualified, from the year 1812 it became customary only to appoint barristers of at least three years' standing. In 1815 a commission was appointed to study the duties

and salaries of the judges. As a result of their report, the fee-system was abolished in 1826 and the ordinary judge's salary was increased from 2,400 to 5,500 pounds a year. The authority of the courts and judges was further promoted. However, in 1836 the expense of prosecution was borne half by the county and half by the Exchequer. In the middle of 19th century, in order to foster and guard the legal authority, Britain took two measures: one was that the expenditure proportion of local fiscal organ for judiciary should be regulated by the Parliament legislation; the other one was that the salary of judge was promoted at a large-scale. Since then, the respected image and reputation of judiciary were gradually established; the sense of professional honor raised there from, therefore many talented persons come to compete for the legal profession. However, before that, some of the judges, especially magistrates were previously shoe-makers and bricklayers. It shows that the guarantee of judicial funds and promotion of judiciary are fundamental measures in keeping judicial fairness.

The standards of judicial funding and salaries of judges in China should be studied further. Nowadays, the salaries of Chinese judges are the same as that of administrative officials, and sometimes even as that of the ordinary workers. The small salary is not enough to keep up a decent life. The judicial funds mainly come from local finances. The funds of every judicial organ at the country level are very different, partly because of economic development and partly because of its administration of justice. So the local governments and Party committees can easily interfere in judicial activities through the funds, which results in local protectionism and the judiciaries in local levels becoming subordinate to local governments.

As to the judicial salary in China, I believe there are two factors to consider. The first is the present salary structure; roughly 30% of the salary comes from the judiciary's enterprise profits. The second factor is the level of judicial salary, which should be at least double that of an 'ordinary' worker. The state must guarantee that a judge can support his or her three-person family.

With regard to judicial funding I suggest two devices. The first is that central finance supports the salaries of the judiciary and local finances support the construction expenses, equipment and business expenditures. The quantity and proportions should be regulated by the National People's Congress. The second is that all judicial funds are supported by central finance, and placed on the state budget.

d. Dividing the Judicial districts and making them different from administrative areas.

At present, the local protectionism in judicial areas is very serious, and does great harm to the reputation of the judiciary. As a result, it hinders the fostering and development of a market economy. Tracing the local protectionism to its source, we can find that its main cause is the dependence of judiciary on the local party committees, local people's congresses and the local governments for finance, promotion and arrangement of personnel. If the judicial districts were divided and made different from administrative areas, the grounds on which the local protectionism stands would be naturally removed.

In terms of related foreign cases, the models of judicial districts vary. The unitary model of judicial districts and the multitple model of judicial districts, mostly evolved historically. According to Chinese national conditions, the unitary model of judicial districts seems comparatively suitable. The unitary model of judicial districts means that the jurisdiction area of courts is separated from the local administrative districts. The vertical structure of judiciary system continues to be a four-level system: basic judicial district, intermediate judicial district, high judicial district and the supreme judiciary.

First are the methods and bases of the division of basic judicial districts. The method of division of a basic judicial district is that a basic judicial district consists of several townships in rural or residential districts of a city; the seat of the judicial district should be placed in the central township. The township or the residential district is the branch unit of the county-level government. It is not strictly an administrative area, but it has a natural boundary which is convenient for people to distinguish the judicial districts. The size of a basic judicial district should be kept to five ordinary townships or residential districts; one or two may be added or reduced in accordance with the economic development, population and range of the district.

There are four bases of division of a judicial district: firstly the present judicial district of a basic court which is the same size as the county is too large. Most basic courts established their branches in the townships or residential districts, however, the township or the residential district is too small, and it is difficult for them to manage their branches. Secondly, the seats of a basic court are placed in the central township of the basic judicial district, which must be beneficial for the court to investigate and judge, and good for people to join in the action. Thirdly, the township and residential districts in China amount to 53537, therefore, the basic judicial districts may amount to 10707. This will be 6 times more than the present number of basic courts, but 5.5 times less than the number of the branches of the basic courts. The number of judicial officers may be reduced on a large scale because of the geographical superiority.

Second, the methods and bases of division of the intermediate and high judicial districts should be reviewed. The methods of division of these are: 15 basic judicial districts constitute an intermediate judicial district. Therefore, there are 714 intermediate judicial districts throughout the country, 5.6 times more than the existing intermediate courts. Added to that, 15 intermediate judicial districts make up a higher judicial district, meaning that there are 48 higher judicial districts in China, which is an increase of roughly 50%.

The grounds for dividing intermediate and higher judicial districts follow. Firstly, modern theories of management and administration show that it is efficient for a higher authority to administrate 15 lower bodies. If there are more than 15 lower bodies under a higher authority, it often needs to design middle agents; if there are less than 15 1ower bodies, it often results in a waste of managing resources. However, the major functions of the supreme judiciary are judicia1 policy-making and supervisions, so its lower bodies may increase in number. Secondly, as the offices increase, the geographical superiority and efficiency of management are promoted too, so the number of judicial officers of the country will decrease. Thirdly, such division of judicial districts is separated from administrative districts, which is based on the natural community unit, so it is easy for the state to divide the judicia1 districts.

The reforms carried out for the establishment of the market economy, the rule of law and modern judiciary in China are unprecedented and are unfolding on a magnificent scale. Although in the process of achieving this goal, China will inevitably encounter many difficulties and challenges, the direction of the reforms has already been determined and the road to success opened up. I am confident that, through the concerted efforts of the Chinese people, China will accomplish this historical task.

CHAPTER 9: CONCLUSION

No matter whatever the comments are, whether commendatory or derogatory, Chinese judicial institution and its operation have been discussed hotly as a constant topic in the country, and also have been a concern to the world since 1990's. The long puzzling question is: after 26 years of economic reform and opening policy which started 1980, why the judicial sector has not significantly improved? My answer to this is: China's slow reform of its political institutions including the lack of democratisation has retarded the development of Chinese judicial reform. However, judicial reform becoming a hot topic in Chinese society has indicated clearly that Chinese people realize increasingly that judicial institution of modern society is the final defense for social justice and fairness, and also is the safeguard for human rights and liberties. As we could observe obviously in China, Chinese people have been in an ambivalent position as far as the judicial institution is concerned, owing to the deficiency in the guiding principles with regard to structure the modern judicial institution and the corruption phenomenon that has been existing widely in the judicial activities. On the one hand, people (Chinese or Westerners) have shown hope that the Chinese judiciary will be impartial in certain aspects of the social life; but they also have strong doubts about the independence and impartiality of the Chinese judiciary in practice.

There are now many publications of Chinese scholars and Western scholars focussing on Chinese legal and judicial reforms. In order to avoid duplication and to introduce some new thinking, I have attempted to use a new angle to express my ideas about the modern framework of the judiciary and the trends in the revolutionary changes of the Chinese judicial institution from the traditional model to the modern model.

This research indicates that judicial modernisation is an inescapable aspect of China's transformation from an agricultural society to an industrial society and from a traditional society to a modern society. The market economy, democracy and the rule of law are three primary goals in the course of the transformation. Accordingly establishing a modern judicial institution is just about to meet the common needs of the market economy, democracy and the rule of law. Therefore, establishing a modern judicial system through institutional innovation, which definitely breaks from the traditional model and could accommodate the whole demands of the modern society, is the most important task of Chinese social development, and it will critically determine the direction of Chinese social development in the future. It could be expected that the Chinese judiciary will become more powerful force that will contribute to healthy social development. This thesis is to deliver myself of a basic understanding and comportment about the transformation of the Chinese

judicial institution from the tradition to the modern through a study in judicial reform in revolutionary conditions. Of course I do not strive to write this paper discussing about all the issues in this field. However, most of issues relevant to the changes or reforms in Chinese judicial institution have been duly dealt with in this paper, which answered the research questions and tested the initial hypotheses.

1. As a universal historical process, modernization is a transformation and a quantum leap from the traditional society to the modern society, and is unavoidable. Modernization requires a complete transformation of all the systems by which man organizes his society, including the political, social, economic, intellectual, religious, and psychological systems.

Modernization is a revolutionary concept and a historical subrogation which promotes the modern lifestyle and institutions rather than the traditional lifestyle and institutions. This historical quantum leap caused a huge creative innovation in the whole value of human civilization. The transformation from the traditional to the modern society involved a complete transformation. It must be viewed as a process that results in the fundamental transformation of society, economy and politics: all aspects of human thought and behaviour have changed in the process. Consequently, it is a systematic process. Every aspect of the modernization is closely associated with each other, and changes in one area will cause changes in and impact on other areas.

Modernization is a global process and a worldwide phenomenon. All societies (countries) that have existed, no matter what the developmental road they chose, have already been transformed, or are transforming, from traditional to modern societies. They might have entered into the new developmental orbit directly and proactively, or they may have had to be changed passively by the spring tide of modernization.

Modernization is a long-term and continuing process. The transformation from the traditional to the modern can take a whole century. The transformation may be divided into different levels or stages; however, it is also a continuing process like a flowing torrential river. Thus, the modernization process is an organic unification of stage and continuum. It requires the capabilities for institutionalizing change and providing for the continuous alteration of society and the political system.

Modernization is a process that makes different societies converges. There are many different types of traditional societies and it could be said that their only commonality is their lack of modernity. In

contrast, even though the nature and extent of change from a traditional to a modern society are bound to differ from one setting to the next, modern societies have many common themes and patterns and display a trend towards convergence.

Modernization is an irreversible and progressive process. Although some areas or countries may experience temporary frustrations and setbacks during the modernization process, on the whole, modernization is a long-term trend in the world.

In addition, it should understand that the essence of modernization is a civilizing process. As a historical process and a social revolutionary force, modernization may be regarded as a style of civilization that represents our historical time. In fact, the necessary associated elements for modernization include a reasonable spirit, life and economic ethics, not just the elements of economic and social structure.

2. Through the analysis of modernisation, it can be observed that as a society transforms from the traditional to the modern, the judicial institution also faces a historical revolution, which transforms it from a traditional pattern to a modern one. This process of transformation is judicial modernisation.

Judicial modernisation is a quantum leap in the human legal civilisation, which causes a new creation in the value system of the whole legal civilisation. Legal phenomena are not concrete, but are in continual movement along with the development and changes of social, economical, political and cultural phenomena. The process of human civilised development has formed different legal and judicial patterns. The traditional judicial pattern is established on the foundation of human dependent relations. In this social atmosphere, individuals lack independence, in fact, dependence is the basis of people's social relations.

Judicial modernisation is a profound revolution in the progress of human civilisation. Modernisation does not only create a new governmental model, but also a new social and economical framework, a new idea of social community and a new legal structure, as well new universal values and faith. With respect to the judicial revolution, the essence and framework of the traditional judicial institution has changed completely; new values and standards of judicial justice and its operating system have been established. Accordingly, the modern judicial system can supply efficient institutional support to the new system of social life.

3. This formal manifestation of this judicial transformation first appears in changes in the legal system.

While there are variations in this trend between civilisations and societies, as a general model it is observable that legal modernisation of which judicial reform is a central element is a basic step in the historical process. The characteristics of the modern judicial paradigm are: (a) a highly differentiated and functionally judicial system which is separate from legislative and executive power; (b) a high degree of independence of the courts and judges *de jure* and *de facto*; (c) rational legal procedures for the making of the courts' decisions; (d) judicial judgments based upon a certain, prospective, efficient and autonomous system of law; (e) a system of checks and balances operated by the court system; and (f) highly qualified and professional judges.

The modern judiciary, whether in a civil law or common law country, as long as it is within a liberal democracy, is established on the constitutional foundations of the following principles: the representative principle, the separation of powers and checks and balances and the principle of judicial independence. In modern countries, the characteristics of judicial authority are neutrality, justice and independence.

Judicial modernisation is a transforming process from a society of the rule of man to a society of the rule of law. The process of historical subrogation from a traditional judicial pattern to a modern one is quite complicated. However, the rule of man and the rule of law can represent the dividing line between the traditional judicial institution and the modern judicial institution, and also constitute a basic measure to distinguish the two kinds of judicial values; the modern judicial system is connected with the rule of law, while traditional judicial systems involve the rule of man. Therefore, we can use the increase in the rule of law and the reduction in the rule of man as a means of evaluating the process of judicial modernisation.

4. The modernization of the judicial system is a result of the gradually increasing awareness of human rights and the interaction among people with increasing capacity for rational recognition.

The need to protect human rights could be regarded as the common instinct of people. The three basic aims of modernization, democratic politics, a nation ruled by law and a market-oriented economy, are also the institutional setting for the transformation into a modern judicial system. There are two basic, worldwide pathways to judicial modernization. One is judicial modernization from within, or endogenous change. This means that the motives for judicial modernization come

from society's own dynamics. The step by step or gradual progress is an essential pathway to this kind of judicial modernization. The other model is judicial modernization from without, or exogenous change. This refers to the judiciary that is impacted by outside influences causing internal, economic and political revolution. The radical approach is a pathway to this kind of judicial modernization. The modernisation of the judicial system is universal, but how this modernisation works, the possibilities and difficulties and the specific forms depend on the countries themselves. Countries do not have the same destinies, and nor do they have the same mode of modernisation.

The existence of a judicial system needs at least four elements. The first is the element of structure. How well is the judicial system separated from other government agencies, how independent is it and how rational is the procedure of trial? The second element is that of substance or the reasons behind judicial verdicts. Next is the element of subject, meaning the professional status of the judges. Finally, is the element of function, which refers to how the judicial system objectively satisfies the needs of survival and development of all parties in the society. Generally speaking, the static state of a judicial system, which is basically its framework, is composed of the structure and substance elements. Conversely, the dynamic picture of a judicial system, the system's flesh and blood, is reflected by the elements of subject and function. It is probable that, through research and analysis, we will find a number of differences between the traditional and the modern judicial systems.

5. According to the theoretical models of the traditional and modern judiciaries the Chinese judiciary, which lasted a thousand years until the final phase of the Qing Dynasty, can be regarded as a traditional judiciary.

The characteristics of the traditional Chinese judicial system were as follows. There was a limited division of trial functions and governmental functions, and no separation of powers. The judiciary had no independence and it's work was regarded as just one part of the basic administrative functions performed by the government in ancient China. The judicial function was simply to maintain the authority of the father, husband and the imperial power as well as to solidify the autarchy of centralisation. The traditional Chinese judicial system placed much importance on the statute law, and also used precedents in trial work. There were very few procedural provisions in the laws of the dynasties in ancient China. Governmental officers were selected from imperial examinations in ancient Chinese society, which exams required the candidates to have knowledge of literature and history, as well moral character. However, there were no requirements for knowledge

of administration or the law. Judicial work regarded as part of administrative work and the officers dealing with cases were the same ones dealing with administrative affairs. Therefore, the judicial method could never become a specialised skill, despite the fact that the ancient Chinese law had several thousand years' history. Ancient Chinese law can, in fact, be interpreted as being ethical rather than legal in nature.

6. From 1898, the Qing government of China began to reform China's political system and tried to practice the separation of three powers under the imperial power, based on the Western political system.

The traditional Chinese judiciary, which had followed thousands of years of conventions and traditions, was stricken and collapsed after 1898. From the late 19th century to the middle of the 20th century, China made efforts to learn from the advanced countries in the West for establishing a constitution and a modern judicial system and reforming the legal system. The political, legal and judicial modernisations were regarded as a nice political ideal, for which the Chinese people had struggled for the past 50 years. During this 50 year period, there were successes and hopes, but mostly failures and setbacks.

7. Some traditional elements, in particular the institutional arrangement which was formed under the circumstances of the self-isolation after 1949 have existed stubbornly and have strongly influence on Chinese society in the 21st century.

Since the 1980s, the economic target model for China has been a market economy, which shows that China has been pursuing modernization as a goal for society. Therefore, 21st century Chinese society is very complicated, the traditional elements and the efforts to modernize have become entangled, resulting in the current Chinese judiciary having a dual nature: a traditional and a modern nature. Although the efforts of the Chinese courts to pursue modernization are visible over past 26 years, the traditional elements seem to leach into the judiciary, and have retarded the process of judicial modernization. In contemporary China, it is a fact that the judicial reforms have made a certain grade, which is there for all to see. However, it can also not be denied that a modern judiciary in tune with the principles of a market economy, democracy and the rule of law has not yet been truly formed. The current Chinese judiciary is still interspersed with traditional features. Jjudicial activities are controlled in many ways by both formal and informal institutional arrangements. The courts cannot manage personnel, financial and judicial matters autonomously. The Chinese judiciary has no authority to check and balance other state organs. Although the

Chinese courts have a certain restricting function over administrative power, in accordance with Administrative Procedural Law, the function's effectiveness is in question. The courts and judges make judgements according to policies, current social requirements or social circumstances rather than the law. The courts and judges neglect procedural justice and indeed a fair procedural system has not really been established de facto and de jure. In terms of legal knowledge, many Chinese judges lack the relevant legal education and training.

8. Despite the difficulties and setbacks that China has faced in establishing a modern judicial system since the 1950s, it is now possible to believe that China is on the road to establishing a modern judiciary.

During the first half of the last century, China transitioned from a country in chaos to having a state of order. During the second half of the last century, China progressed from order to development. After roughly 26 years of reform, and a complete transition of its economy, society, culture and politics, China has moved into a new era. The planned economy has changed to a market economy; society has changed from traditional to modern; culture has changed from monism to pluralism. All of these have aided the overall transition from autocracy and the rule of man to constitutionalism and the rule of law. The process of social modernisation thus necessitates a revolutionary transformation of the Chinese judicial system from the traditional to the modern paradigm. As a major political policy, the reform of the Chinese judicial system was formally proposed at the end of the 20th century. This reform was a need that had been felt by the whole society since the 1990s when the socialistic market-oriented economy was in its beginnings. Accordingly, the social structure and its way of running were experiencing a huge change, which applied the necessary pressure to modernize the judicial system.

9. The modernization of the Chinese judiciary is a historical course that goes along with the transition of Chinese society.

The current judiciary and its operating system will experience huge, essential changes during the procedure of transition. The basic aim is for the judicial institution to be able to accommodate the requirements of social development and transformation, and also reflect the values and goals of a modern society. Accordingly the Chinese judicial modernization is of historical significance encompassing the whole judicial system. It is a kind of historical progress that all of the countries of the world have experienced or will experience sooner or later, characterized by the individual experiences of each country. This historical process transfers the theoretical target into a practical

reality. The task of the modernization is to convert expectations into reality.

10. According to common experiences of the world communities and Chinese specific situations, the holistic goal of Chinese judicial modernisation should be as follows.

(a) Separation of powers and judicial independence. Judicial reforms are an important part of political institutional reforms in China, so it must be considered in the context of the whole framework of state powers. Therefore, the key point of the judicial reforms is to locate the separate position of judicial power in the framework of state powers, and to entrench the fix the judicial position in the constitution. b) To exert judicial functions. The modern judiciary should bring its multi-functions into play in a wide social life. c) Proper procedure has been intensified.

11. Four main obstacles arise from the current political institutional arrangements, ideology and knowledge base, which have existed since the commencement of the Chinese judicial reforms.

First obstacle is the current Chinese constitution. The concept of judicature and judicial power being separate from other powers, as well as the judicial organ exercising judicial power independently, have been not stipulated in the current Chinese constitution. Second is the entrenched political institutional arrangement of China. Under the controlled economy and one party dictatorship, all resources are centralized in the hands of the CCP and the government. Consequentially, Chinese judicial power is not independent and Chinese citizens had no property rights. The ongoing reforms are designed to actually disperse political resources, return the legislative power to the legislature and return judicial power to an independent judiciary. Third is the ideology. The CCP's ideology has impacted strongly on the course of Chinese reforms. The final obstacle is lack of knowledge on the running of a market economic system and a modern legal system.

12. In the past 30 years, Chinese society has gone through unprecedented and profound changes with respect to its economic, social, cultural, political and legal systems.

These changes have been aiding in the transition of Chinese society from a traditional society to a modern one, and are also laying a foundation for democracy and the rule of law in China. Additionally, based on an analysis of the current conditions, it is possible to believe that China is moving towards the inception of a modern judicial system. Under the current circumstances of China, judicial modernisation has faced many tasks that are quite complex.

But from the angle of operational research, the immediate measures for the Chinese judicial modernisation that should be taken in the near future include the following: (a) The People's Congress's supervision on judicial business should be stopped. b) The method by which the CCP exercises leadership over the judiciary should cease to be through intervention in particular cases. Its leadership should be by general policy setting through legislation. . (c) The financial system of the judiciary should be reformed to ensure the adequate judicial funding. d) The demarcation of judicial districts should be made different to the division of administrative areas.

Chinese judicial modernization is under way and the ideas or predictions as presented in this thesis still need to be tested by practical experience. Consequently research on Chinese judicial modernization should be open and endless. The vigorous reform in Chinese legal and judicial institutions calls for more profound and scientific research. I intend to make further efforts to contribute to this ongoing research.

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